The Central Law Journal.

SAINT LOUIS, JULY 27, 1877.

CURRENT TOPICS.

WE REPRINT elsewhere from the St. Louis Republican, a letter of Hon. John F. Dillon, Judge of the United States Court for the Eighth Circuit, written to a prominent member of the St. Louis bar, in reply to one of the most wanton and indefensible attacks to which a blameless and upright judge was ever subjected. From the facts stated in this letter, nearly all of which are of record, as will be seen by the reports of the various rulings in the case in question, as they appear in 3d Dillon, 3d Otto, and in the last number of this journal, it will appear that all the material statements contained in the article in the Nation are false in letter and in spirit, in fact and in intent. Some excuse may possibly be found for a disappointed litigant, who having failed in the court of last resort to obtain what he seeks, vents his spleen in a series of false accusations against a particular judge, to whose rulings he imputes his failure. But when the editor of a journal widely circulated among cultivated men, repeats in his columns such accusations, with apparent approval, and without waiting to ascertain their truth, he does a most wicked and inexcusable thing. Under a proper press law such a person would find himself behind the bars of a prison. Unless the national legislature shall provide for the punishment of such libels, a new way will have been found to undermine the independence of the judiciary.

THE CHARGES of unprofessional conduct recently brought against two members of the bar—Messrs. Mitchell and Bowman—have been investigated by a committee of the Bar Association, and a report has been submitted and adopted advising the prosecution of both before the courts with a view to their disbarment. This result in the Mitchell case seems to have been arrived at without much trouble, and indeed after the way in which this attorney chose to meet the charges, a formal investigation was almost superfluous. No better evidence of the decline of the standard of professional honor, in some quarters at least, is required than this, that a lawyer charged with malpractice and deceit, instead of meeting the accusation with indignation, or confessing it with shame, should admit it, and without endeavoring to palliate it in the least, should reply for his only defense, that others would have been glad to have had his chance. The charges against Mr. Bowman are two in number. The first is that in August, 1875, while attorney of the insurance department, he accepted a fee of $900 from the St. Louis Life Insurance Company for professional services; and the second, that in October, 1876, while attorney for the insurance department, he accepted a retainer of $7,000 as attorney for the life association for one year, and acted as such attorney. Mr. Bowman has admitted the receipt of the fees, but denies the alleged relations with the opposing parties. The committee find, however, against him on the facts above stated, and recommend that "he be prosecuted for malpractice and deceit and misdemeanor in his professional capacity, with the view to remove him from the bar, and that the prosecution be instructed to proceed in the matter with full authority to frame such complaints against him as the facts will warrant." In these two cases the bar association has acted thus far promptly and in earnest; it now remains for the courts to do their duty.

WE REPRINT from the Irish Law Times Reports a very interesting decision—Long v. Keightly,—upon the right of action at common law for seduction. The decision illustrates the curious results at which courts may arrive by resorting to fictions for the purpose of obtaining justice. In the particular case the person seduced was a woman twenty-four years of age who, after her father's death, resided with her mother, discharging domestic duties for her. She was seduced in her mother's house at midnight on the night previous to her emigrating to America in pursuance of previous arrangements. She entered into another service upon her arrival in America, but subsequently finding herself pregnant, left that service in order to return home. On her return to Ireland she went to reside at her sister's house, where she remained until her confinement had taken place. A considerable time after this, she returned to the house of her mother, who then brought an action for the seduction. The court held that there was a loss of service, for which an action by the mother was maintainable. No doubt the result arrived at by the Irish court is to be commended; for damages awarded in such cases are in the nature of a fine rather than a compensation for a personal or family disgrace. But the absurdity of the result consists in the fact that the damages are given to the wrong person. The mother was not at common law entitled to the services of the daughter, the latter being more than twenty-one years of age. It must be supposed then that the services which the daughter had been rendering to the mother were rendered in pursuance of a contract; but the testimony makes it clear that the contract had terminated at the time the seduction took place, and that the termination of it was intended to be permanent. If the services were actually renewed after confinement had taken place, that must have been in pursuance of a subsequent contract, which the mother entered into voluntarily, and which she might have declined to enter into without pecuniary loss. The whole subject is too ridiculous for discussion. The gravamen of the offense was the physical and mental injury suffered by the person seduced, and the disgrace inflicted upon her and her family. Such being the case, the right to compensation manifestly lay in the daughter, and not

in the mother. The mother had no higher right to damages than a sister or a brother would have had. What we complain of in all these cases, where the legislature has not interposed by a proper statute, is that courts have not the courage to desert the miserable subterfuge of loss of service and place the right of recovery in every instance upon the proper ground, and give the right of action in every instance to the person to whom it properly belongs.

IN PENN. R. CO. v. LEUFFER, 24 Pittsburgh Legal Jour. 177, the Supreme Court of Pennsylvania held that certain statutes which in effect gave a lien to "contractors, laborers and workmen," upon the railroads and other property of public companies, for debts accruing to them in consequence of the repairs and construction of such property, did not include civil engineers, although the latter were required to render service to the company from the commencement to the completion of the work. The court say: "In Hebner v. Chase, 5 Barr, 115, the act of 1845, prohibiting the attachment of laborers' wages, came up for construction, and it was held that that act was intended to secure to the manual laborer the fruits of his own work for the subsistence of himself and family, and that it did not embrace the earnings of a contractor. So, in Smith v. Brooks, 13 Wright, 147, 'wages of laborers' were defined to be the earnings of the laborer by his personal, manual toil. In like manner servants' wages, treated as preferred debts, in the settlement of the estates of decedents, under the act of 1794, were held to be the earnings of such servants only as make part of a man's household, and whose business it is to assist in the economy of the family, in short, menial servants. *In re* Meason, 5 Bin. 167. Thus we may see that in these, as in many other cases which we might cite, this limited sense has been given to the word 'laborer, workmen, servants' and the like, and this for the very obvious reason that, in all statutes of this kind, the intent has been to protect a class of persons who are wholly dependent upon their manual toil for subsistence, and who can not protect themselves. The same result was reached in the very recent case of Wentworth's Appeal, in the construction of the Act of April 9th, 1872, per Mr. Justice Sharswood, 24 Pitts. Legal Journal, 95. It is true, in one sense, the engineer is a laborer, but so is the lawyer and doctor, the banker and the corporation officer, yet no statistician has ever been known to include these among the laboring classes. We can not, therefore, even to save a meritorious claim, undertake to make a new classification which must necessarily defeat the statutory intent."

IN MERCHANTS' BANK v. PETERSBURG R. R., 24 Pittsb. Leg. Jour. 192, it was held, by the Common Pleas Court of Philadelphia, that mortgagees of personal property of a railroad company, out of possession, are to be postponed to creditors who have obtained a lien by judicial process. Certain moneys belonging to the defendant corporation was attached by garnishment in the hands of the Pennsylvania Railroad Company. The garnishees admitted in their answers that they had in their hands $5,021.23 of the defendant's money, but allege that since the attachment was served, a receiver had been appointed by the Circuit Court of the United States for the Eastern District of Virginia, to take charge of the property and effects of the Petersburg railroad. They also averred that, by certain deeds of trust theretofore made by the company, they had transferred all their property to trustees in trust to secure the payment of certain bonds issued by the company. These deeds bore date respectively November 20, 1865, January 1, 1869, and May 1, 1872. An examination of them showed that they were mortgage deeds in the ordinary form in which such corporate securities are made, and that, until default had been made, the defendant was to retain possession of the property, and that the trustees under the mortgages had never been in possession of it. "A mortgagee of property out of possession," said Thayer, P. J., "has no priority over a creditor who has obtained a lien. This is as true of corporations as it is of natural persons, unless, indeed, a different result is provided for by some competent legislation. Until these mortgages are foreclosed, therefore, and the trustees or mortgagees are put into actual possession of the property, they have no claims paramount to those of creditors. Gilman v. Illinois and Mississippi Telegraph Co., 1 Otto, 603. Neither can the appointment of the receiver in Virginia affect the plaintiff's right; for, independent of any question relative to the extra-territorial effect of such appointment upon the rights of creditors, proceeding for the recovery of their debts in the forum of the actual *situs* of the property, it here appears that the lien of the plaintiffs' attachment had fastened itself upon the fund in the hands of the garnishees before the appointment of the receiver."

AN interesting question in the law of libel was recently decided in England, in the case of Leyman v. Latimer *et al.*, 25 W. R. 751. The defendants were sued for having printed in a newspaper, of which they were proprietors and editors, that the plaintiff, the editor of a rival paper, was a "convicted felon," and for having also referred to him as "a felon editor." They justified on the ground that the plaintiff had been convicted of a felony and sentenced to twelve months hard labor. The plaintiff replied that he had "duly endured the punishment to which he was so adjudged, and thereby became and was, and has ever since been and is, in the same situation as if a pardon under the Great Seal had been granted to him." To this reply the defendants demurred, and, at the trial, Blackburn, J., without hearing evidence, entered judgment for the defendants. On appeal, this judgment was reversed, Cleasby, B., speaking for the whole court. He referred to Cuddington v. Wilkins, Hob. 81, the oldest case upon this point

to be found in the books, where the report says: "Cuddington brought an action of the case against Wilkins for calling him thief; the defendant justified, because beforetime he had stolen somewhat; the plaintiff replied a pardon. It was adjudged for the plaintiff, for the whole court were of opinion that, though he were a thief once, yet when the pardon came it took away, not only *pœnam*, but *reatum*, for felony is *contra coronam et dignitatem regis*." The same case is again referred to in a late part of the same reports, four years afterwards, at p. 293, in a case of Searle v. Williams, where he says: "And, therefore, I hold, that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of Cuddington v. Wilkins." "The conclusion is inevitable, therefore," says Cleasby, B., in the principal case, "that if calling the plaintiff a felon editor involves the calling him a felon, the plaintiff is entitled to his action, and there must be judgment for the plaintiff upon the demurrer to the reply. It is not necessary to decide what would have been the result if the defendants had only said of the plaintiff, as they do in their first article, 'he is a convicted felon.' In that case there would be more doubt in the absence of any decided cases as to the effect of those words, and it might be said, if you choose to read the words favorably for the defendants, that they only mean he has been convicted of felony. But it rather seems to us they ought not to be read so favorably, and that the result ought to be the same. It was not true to say of the plaintiff that he is a convicted felon. He is not a convicted felon when he has been pardoned, and he was a pardoned felon, and the felony was at the time extinguished. The calling him a felon, and attaching the infamy of felony to him, would import that he had not been pardoned. It would have been a different matter if the defendants had written of the plaintiff that he had formerly committed a felony, or had been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered, was withheld; at least such is our opinion, and the distinction is taken in Cuddington v. Wilkins, p. 82. The distinction is not a verbal one merely, but the two statements would have a different effect. A man stating that another was a felon, would be listened to as informing his hearers that the man was infamous and to be shunned; but a man who stated that another man (perhaps the editor of a newspaper, and in a respectable position) had been convicted of a felony twenty or thirty years ago would probably himself be more condemned than the man he spoke of. But however small the distinction may be, a slanderer should take care to be within the truth." The cases of Gwynn v. Southeastern Railway, 18 L. T. (N. S.) 738; Biggs v. Great Eastern Railway, 16 W. R. 908; Alexander v. Northeastern Railway, 13 W. R. 651; Hawkins, P. of C., book 2, c. 37, s. 48; R. v. Crosby, 2 Salk. 689; Boston's Case, Latch, 22; and Celier's Case, Sir T. Ray. 369, were also cited in the argument.

FOLLOWING TRUST PROPERTY.

II.

The American cases in which the owner of property, or *cestui que trust*, has been allowed to follow and trace his property or its proceeds, exhibit all the variety of the English cases, with many new features. Our text-writers have endeavored to extract from both the English and American cases certain general rules, which may be found in Story on Agency, §§ 229, 231; Perry on Trusts, §§ 463, 835, 836, 837; Story's Eq. Jur. §§ 1258, 1259, 1260. The cases show, however, that both at law and in equity, the principle which controls them is not easy of limitation or definition, though the power with which it asserts itself is unmistakable and irrestible. It is simply that equitable principle, though often applied at law, which Mr. Story refers to, by virtue of which the courts will, "especially where there is any fraud touching property, interfere and administer a wholesome justice, and sometimes even a stern justice, in favor of innocent persons, * * * by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien." Eq. Jur., § 1215.

In Overseers of the Poor v. Bank of Va., 2 Gratt. 544, an attorney had deposited in a bank, mixed with his own moneys, certain money collected for plaintiffs as their attorney. The plaintiffs filed a bill to recover it, and traced it substantially as a gross sum, identifying it as the money collected on their account, and were allowed to recover the debt from the bank, *pro tanto*. It was said: "The well-settled principles of law entitle a principal, in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives or assignees, to reclaim it, unless it has been transferred *bona fide* to a purchaser of it, or an assignee for value without notice. In such cases it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property, if it be distinguishable and separable from other property or assets, and has an earmark or other appropriate identity." This language, borrowed in part, as we have seen, from Taylor v. Plumer, was adopted in Whitley v. Foy, 6 Jones Eq. 34. Here the money of the principal was deposited by his agent in a bank, in his own name, but with the statement that it was the money of his principal. This statement was held to furnish a sufficient identification of the fund, and it was recovered in equity, as an independent fund or debt, as in the case in 2 Gratt.

In Thompson v. Perkins, 3 Mason, 232, factors had sold goods and had taken notes therefor in their own names. They made an assignment prior to the maturity of the notes, and at maturity the notes were collected by the assignee. The owner for whom the goods had been sold was allowed to recover from the assignees the amount of the notes, upon the principle that, by means of the notes, he was able to trace the proceeds of his property into

the debt which they represented, and thus into their proceeds. Story, J., said: "In this case the sole qestion is, whether the notes, taken in payment for the goods of the plaintiff upon the sale by Messrs. Winslow, Channing & Co., were the property of the latter at the time of their failure. If so, then they passed by the assignment to the defendants; if not, then the present action is completely sustained. Nothing is better settled at the present day than the doctrine that the principal is entitled to recover wherever he can trace his own property and distinguish it from the mass of the property of his factor. If it has been sold and notes taken in payment, and they can be specifically ascertained, they remain the property of the principal and he has a right to receive them." p. 235.

Kip v. Bank of New York, 10 Johns. 63, is an early American case in which the principle is applied at law in an action on the case. The beneficiaries under a trust assignment, holders of certain notes, sued in case to recover a fund, the proceeds of the assignment, and to have it applied under the assignment to the payment of the said notes, which fund the trustee had deposited in the bank in his own name, and which was then in the hands of the defendants, the assignees in insolvency of the said trustee. The court, Kent, C. J., presiding, held that the trust fund still belonged to the beneficiaries, though deposited by the trustee in his own name, and said: "The only check to the operation of the rule is, where the property is converted into cash by the bankrupt, and has been absorbed in the general mass of the estate, *so that it can not be followed or distinguished.* It is the difficulty of tracing the trust-money, which has no ear-mark, which prevents the application of the rule. But here that difficulty ceases; for the money, which was the proceeds of the trust-goods, was kept separate and distinct, and deposited as such with the defendants."

The rule was carried to great length, and the very broad principles of equity above referred to were applied in the action of assumpsit, in United States v. Waterborough, Davies, 154. A pension had been procured by fraud from the plaintiff, and a large portion of it had been unlawfully retained by the pensioner's attorney as his fee. The town of Waterborough sued the pensioner for money paid for his support as a pauper, and garnished the attorney, who paid a part of the fee to the town by way of compromise. The United States then sued for and recovered the latter sum from the town, under the rule in Taylor v. Plumer. The pensioner and his attorney, having knowingly received the moneys of the plaintiff by fraud, were chargeable as trustees; and the town having had notice of the same facts contemporaneously with its receipt of the money, was in like manner chargeable as trustee. The identity of the fund was established simply by the fact that the attorney had no other fund of the pauper in his hands except the pension money. The court said: "The identity of money, considered as a debt due, or a credit, that is, as a general value in account, does not consist in the identity of the coins or pieces, but in the identity of the fund." And, citing the rule that an assignee succeeds merely to the rights of his assignor, and is bound by all trusts by which the latter was bound (1 Story's Eq., § 533), it said further: "If this is a rule with respect to specific property, as real estate or chattels, it is no less just that it should be applied to money, so long as its identity is preserved; and its identity as money is preserved so long as it can be followed and distinguished from all other money, not regarding the individual coins or pieces of money, but so long as it can be followed *as a separate and independent fund or value, distinguishable from all other funds.*"

F. & M. National Bank v. King, 57 Penn. St. 202, shows the application of the same rule in Pennsylvania. A real estate broker deposited the money of his clients in a bank in his own name, and afterwards absconded. Two of the clients gave notice that they claimed the deposits to a certain amount; but the bank subsequently paid out a portion of the sum on checks previously drawn by the broker. In a contest between the bank, an attaching creditor of the broker, and the broker's clients before named, the latter was held clearly entitled to recover from the bank so much of the deposit as would cover the amount of their funds in the broker's hands. Strong, J., said: "It is undeniable that equity will follow a fund through any number of transmutations and preserve it for the owner as long as it is it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee, or agent, into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership." He cited Story's Eq., § 1259, and Pennell v. Deffell, *supra;* drew the distinction existing in the English cases at law that were supposed to be *contra*, and said further: "But it is insisted that there was no ear-mark to the money. What of that, if the money can be followed, or if it can be traced into a substitute? This is often done through the aid of an ear-mark. But that is only an index, enabling a beneficical owner to follow the property. It is no evidence of ownership. * * * Evidence of substantial identity may be attached to the thing itself, or it may be extraneous. * * * But in regard to money, substantial identity is not oneness of pieces of coin or of bank bills. If an agent to collect money puts the money collected into a chest where he has money of his own, he does not thereby make it all his own, and convert himself into a mere debtor of his principal. The principal may by law claim out of the chest the sums which belonged to him before the admixture." p. 208. Again, citing Pennell v. Deffell, *supra*, Stair v. York National Bank, 55 Penn. St. 364, was referred to as deciding the same point concerning a deposit in a bank made by a trustee in his own name, and allowing the true owner to recover it.

This case was followed as furnishing a sufficient rule for the case of Voight v. Lewis, trustee of Jay

Cooke & Co., in the United States Circuit Court for E. D. Pennsylvania, in October, 1876, before McKennan, J., where Voight recovered the amount of proceeds of the sale of his bonds by Jay Cooke & Co., as brokers, from their trustee, after their bankruptcy, though the money had been deposited by the brokers in the bank in their own name, it appearing simply that such deposits exceeded in amount the sum claimed by Voight. See 9 Chic. Legal News, p. 65. The case of Pennell v. Deffell, was also referred to here; and the court held the "*substantial identity*" of the principal's money to be completely established, adding: "It did not exist in its original form, and therefore could not be identified in specie, but the distinctiveness of its substitute is unquestionable. If it had been converted by his agents into a specific security, equity would lay hold of it, * * * because it could be indentified as the product of his property, and he was, therefore, to be treated as the rightful owner. This result will not be changed by the fact that it had been transmuted into the form of a credit in a bank in the name of the agents themselves."

Cook v. Tullis, 18 Wall. 332, strongly resembles Taylor v. Plumer, 3 M. & S. 562, which it expressly follows. The assignees of a bankrupt banker sued to recover property which, within four months prior to the bankruptcy, the banker had restored, as the proceeds of trust property, to the person from whom he had received the latter. It was held the true owner had but recovered his own, and, as in Taylor v. Plumer, his right so to do was fully upheld, applying the doctrine of the text in 1 Story's Eq. Jur. § 1258.

In Cheshire v. Cheshire, 2 Ired. Eq. 569, a bill was brought to recover the proceeds of a sale of slaves by a life tenant. The remainder-man, upon his accession to the estate, was allowed to maintain such a bill; and he recovered the debt or fund as the product of his own property. The principle under discussion is recognized in a *dictum* of the Vice-Chancellor, in Hutchinson. v. Smith, 7 Paige, 26, and is applied and enforced in cases somewhat variant from any of the foregoing, in Swoope v. Trotter, 4 Porter, 27; Norton v. Hixon, 25 Ills. 452; and School Trustees v. Kirwin, *Ib.* 73.

An extreme instance of the application of the rule is found in Leland v. Collver, 4 Cent. L. J. 7, in which the Supreme Court of Michigan, following the doctrine peculiar to that state by which mortgages on stocks of goods in trade are allowed, applied the rule to a case of such a mortgage on a stock of goods which had, subsequent to the mortgage, passed into the hands of several successive vendees. Each of these vendees having had notice, was held to be in his turn a trustee as to the mortgaged property, and the fund was thus successfully traced and pursued by the mortgage-creditor into the stock of goods in the hands of the last vendee.

This is an application of the rule to the class of cases suggested by the English court in Pennell v. Deffell, in which the trust funds have been employed in merchandising, and have been subjected to all the innumerable transmutations of a stock in trade, but are still traced. Upon similar principles Chancellor Kent followed the funds of A through the hands of B into the mercantile business and stock in trade of B & C, and compelled the latter to account, in Long v. Majestie, 1 Johns. Ch. 305.

There seems, indeed, to be no greater difficulty in such cases as the two last referred to, than in any ordinary case of "confusion of goods" by an agent. And the principle under discussion was directly complicated with those applicable to cases of confusion, and both were considered together in Greene v. Haskell, 5 R. I. 456. There an agent had taken the principal's money, and invested it, inextricably mixed with his own, in ivory. The principal was held entitled in equity to satisfaction out of the whole of the ivory, or a sufficiency thereof to restore to him the trust funds. Lupton v. White, 15 Ves. Jr. 438, was cited, where the lead ore from two different mines had been mixed by the tortious act of the defendant, and plaintiff was held entitled to full reimbursement out of the ore.

So in Hart v. Ten Eyck, 2 Johns. Ch. 108, where there was confusion as to which particular six lots of land, out of a large number acquired by military titles, belonged to the complainant, and he was therefore allowed his choice, the confusion having been occasioned by those standing in a trust relation, Kent, Ch., said: "If a party having charge of property of others so confounds it with his own that the line of distinction can not be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it." The text-writers have given frequent testimony that confusion resulting from the acts of the trustee can never embarrass the rights of the owner or *cestui que trust* in following his property. Perry on Trusts, §§ 447, 837; Story's Eq. Jur., §§ 468, 623; Story's Agency, §§ 205, 332, note. These considerations would seem sufficient to remove entirely all the difficulties which embarrassed the judges in the earlier English cases, as to the mixing of the trust property with the trustee's personal estate.

We deduce from all the cases referred to the following general rules, which, we think, they fairly establish:

1st. It is not necessary to identify particular pieces of money in order to follow a trust fund. It suffices to identify it as "a separate and independent fund or value."

2d. The fruit or product of the trust fund, into whatsoever character of goods, estate or property it may have been transmuted, is still impressed with the trust.

3d. The insolvency or bankruptcy of the agent or trustee does not embarrass or prevent the recovery of the property.

4th. Confusion of the trust estate with the trustee's own property does not prevent the taking of

the former out of the mass into which it has been traced.

5th. The only obstacle to the recovery of the trust fund, so far as the agent or trustee is concerned, will be such a confusion and misappropriation of the trust fund as leaves no mass of property into which it can be traced.

6th. The only obstacle to the recovery of the property, so far as third parties are concerned, will be a purchase of the trust estate, for valuable consideration and without notice of the trust.

7th. Whether the object be to recover the specific trust fund or its proceeds, or simply to hold the trustee personally responsible in his own goods, the same rules are applied by the courts, and the authorities in each of these two classes of cases are interchangeably used and relied on.

J. O. P.

REMOVAL OF CAUSES.

GIRARDEY v. MOORE *ET AL.*

United States Circuit Court, Southern District of Georgia, June, 1877.

Before Mr. Justice BRADLEY.

1. ACT OF MARCH 3, 1875—WHO MAY REMOVE SUIT.—Under the act of March 3, 1875, the right to remove a cause from a state court to the United States Circuit Court exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state.

2. THE ACT OF JULY 27, 1866 (14 Stat. 306), so far as it authorizes a defendant to remove a cause as to him, is not repealed by the act of March 3, 1875.

3. CASE IN JUDGMENT.—A bill was filed in the state court alleging that certain property on which M held a mortgage was subject to a trust for the benefit of the complainant, charging one G with receiving the rents and profits, and praying an account of such receipts, and charging B, the trustee, with breach of trust. All the parties except M, who was a citizen of Pennsylvania, were citizens of the state where the bill was filed. The suit on the petition of M was transferred to the United States Circuit Court. On a motion to remand, *held*, that the cause was properly transferred.

On a motion to remand.

Mr. Justice BRADLEY:

Martha M. Girardey, for herself and as guardian of her children, complainants, v. Andrew M. Moore, John W. Bessman and Isidor P. Girardey, defendants. In equity. On bill for injunction and relief.

This cause was commenced in December, 1875, in the Superior Court of Richmond County, Georgia, and was removed by Moore, one of the defendants, so far as it concerned him, to this court, in October, 1876, he being a citizen of Pennsylvania, and the other parties all being citizens of Georgia.

Motion is now made to remand the cause, on the ground that it can not be thus split into two causes under the existing state of the law. The nature of the case is as follows: The bill charges that certain property in Augusta, known as Lafayette Hall and the Opera House, on which Moore holds a mortgage for twenty-seven thousand dollars, is subject to a trust for the benefit of the complainant, Mrs. Girardey, and her children, paramount to the mortgage; that it was property which was purchased by the defendant, Isidor P. Girardey (her husband), with the proceeds of other property which he had conveyed upon said trust to the remaining defendant, Bessman, but the deed had not been recorded and was lost; that after the purchase of Lafayette Hall and the Opera House, Girardey borrowed $27,000 of Moore and gave him the mortgage in question; and that Bessman, the trustee, acted as Moore's agent in making the loan, thus affecting him with notice of the trust. The bill charges Girardey with receiving the rents and profits, and Bessman with breach of trust, and prays an account thereof, and that Moore may be enjoined from selling the property under his mortgage (which he is seeking to do) until the trust has been established, and for general relief.

Moore in his petition to have the cause removed as to him, states that the controversy in the suit is wholly between him and the complainants, and can be determined as between them without the presence of the other defendants as parties in the cause. His counsel contends that the removal was authorized by the act of July 27th, 1866 (14 Stat. 306), or if that is repealed, then by act of March 3d, 1875. The counsel of complainants insists that the act of 1866 is repealed by that of 1875, and that the latter does not authorize the removal of a cause in the manner in which this has been removed; and that neither act authorizes this cause to be split in this way.

In order to get at the state of the law on this subject, it will be necessary briefly to review the history of the legislation which has been adopted in relation to the removal of causes from the state to the Federal courts on the ground of the parties being citizens of different states. Without noticing other conditions as to amount, etc., the judiciary act of 1789, section 12, authorized a removal where the suit is by a citizen of the state where the suit is brought, and against a citizen of another state. If there were more than one plaintiff or defendant, the courts held that all of the plaintiffs must be citizens of the state where the suit is brought, and that all the defendants must be citizens of other states. The act of July 27, 1866 (14 Stat. 306), without making any change in the requirement as to the citizenship of the plaintiffs in the state where the suit is brought, authorized a removal of the suit so far as it relates to a defendant who is a citizen of another state, though there are other defendants citizens of the state in which the suit is brought, if, so far as it relates to the former, it is brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause. Both of these acts give the right to remove the cause to the defendant alone. The act of March 2, 1867 (14 Stat. 558), gives the right of removal, when a suit is between a citizen of the state where the suit is brought and a citizen of another state, to the latter, whether plaintiff or defendant, on his making affidavit that he has reason to believe that, from prejudice or local influence, he will not be able to obtain justice in the state court. This act, like the act of 1789, has been held to apply only to cases where all the parties on one side are citizens of the state where the suit is brought, and all the parties on the other side are citizens of another state or other states. Lastly, the act of March 3, 1875 (18 Stat. 470), gives a right of removal to either party in every suit in which there is a controversy between citizens of different states; and where the controversy is wholly between citizens of different states, and can be fully determined on between them, it authorizes any one or more of the plaintiffs or defendants, actually interested in such controversy, to remove the suit. This act repeals all acts and parts of acts *in conflict* therewith.

The act of 1875 undoubtedly greatly enlarges the

class of cases which may be removed from the state into the Federal courts, and a more careful examination of it may be useful on this occasion. Before this Congress had never invested the Federal courts with jurisdiction arising from diverse citizenship of litigant parties coextensive with the judicial power conferred upon the general government. Subject to a limitation as to the amount in controversy, this was attempted to be done by that act. It declares in section first, that the Circuit Court of the United States shall have original cognizance (concurrent with the courts of the several states) all of suits of a civil nature at common law or in equity, in which there shall be a controversy between citizens of different states; and in the second section it gives to either party in such suit, as we have seen, the right to remove the same from a state court (if originally commenced there) to the circuit court. And where the controversy is wholly between citizens of different states, and can be fully determined as between them, it authorizes any one or more of several plaintiffs, or of several defendants, thus to remove the suit. The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the circuit court is as broad as the judicial power.

Now, as to the extent of the judicial power I never had a doubt. My view may not be the correct one, but it is that which I have ever entertained; and, as yet, there has been no decision of the Supreme Court to the contrary, whatever *dicta* may have dropped from different judges; and it is this: that whenever the controversy in a suit is between citizens of different states, it is within the judicial power of the United States, though there are other persons in the case citizens of the same state with a person or persons on the opposite side to them. The grant of judicial power is in the affirmative—it extends to controversies (and of course to all controversies) between citizens of different states. There is no negative; no exception of any cases in which the same controversy has also citizens of the same state on the two sides thereof. If the controversy involved is a controversy between citizens of different states, it is within the term, and, I think, within the spirit of the power granted. The constitutional language can not be satisfied without giving it this construction. To say that it only embraces those controversies in which all the parties on one side and all the parties on the other side are citizens of different states, is to interpolate a limitation in the constitution which is not found there.

Of course, persons who are only nominally interested in the controversy can not confer jurisdiction and can not take it away. This has been frequently decided under the former laws.

It is objected to this view that it would be attended with great inconvenience, by having the effect of giving jurisdiction to the Federal courts in cases where only a single one of many plaintiffs or defendants happened to be a citizen of another state. But the contrary view would be attended with equal inconvenience; for cases would arise (as they have often arisen under the old law as construed by the courts) in which one of many plaintiffs or defendants, happening to be a citizen of the same state with one of the parties on the opposite side, has defeated the jurisdiction. Extreme cases of the sort would undoubtedly arise whichever view may be taken, but no intermediate view can be taken which will avoid them. The argument *ab inconvenienti* is worth nothing, for it neutralizes itself by equal weight on both sides.

I do not regard the construction given to the old judiciary act as at all conclusive on this question. I refer to those decisions in which it was held that all the plaintiffs must be citizens of the state where the suit was brought, and all the defendants must be citizens of other states. They were made upon the peculiar language of that act, and took their origin at a period when a strict construction of the Federal jurisdiction in judicial matters was in vogue. The circumstances which induced this tendency are familiar to every student of American history.

If I am right in my construction of the act of March 3d, 1875, the right of removing a cause from the state court to the Circuit Court of the United States exists in all cases where there are substantial parties, citizens of different states, on opposite sides of the cause, although there are parties on opposite sides who are citizens of the same state.

But then arises the question: To whom is the right of removal given? The answer to this question, as derived from the second section, is that it is given to either party, that is, to the plaintiffs or the defendants, in either case acting collectively, and where the controversy is wholly between citizens of different states, and can be determined as between them, the right is given to any one or more of the plaintiffs or defendants actually interested in the controversy. In other words, if some of the plaintiffs and defendants are citizens of the same state, the removal must be sought by all the defendants. One of the several plaintiffs or one of the several defendants can not in this case remove the cause. But if all the plaintiffs on the one hand, and all the defendants on the other, are citizens of different states, then it does not require all the plaintiffs nor all the defendants to remove the cause, but any one or more of either may do it. But in either case it is the suit that is removed, and not a part of the suit.

If my construction of the act of 1875 is correct, it is clear that the removal of the cause could not be had under that act unless Bessman and Girardey are to be regarded as merely nominal parties, and the real controversy in the suit is wholly between the complainants and the defendant Moore, as stated by the latter in his petition for removal. It is not at all improbable that the principal object of the suit was to defeat Moore's mortgage; but the frame of the bill is conceived for the purpose of establishing the trust, and the postponement of the mortgage as a consequence thereof, and Bessman being the alleged trustee, and Girardey being the owner of the property to be affected, it can not be said that the controversy in the suit is wholly between the complainants and Moore. His controversy with the complainants may, it is true, be disposed of separately. But under the act of 1875, the whole suit must be removed, or no removal at all can take place. It becomes important, therefore, to determine whether the act of 1875 has repealed the act of 1866. If it has, the case is ended here. If it has not, then the removal may perhaps be supported by the latter act.

The act of 1875 does not profess to repeal any acts, or parts of acts, which are in conflict with it. Is that part of the act of 1866, which authorizes one defendant, if a citizen of another state, to separate his case from that of the other defendants who are citizens of the state where the suit is brought, and to remove it into the federal court, in conflict with anything in the act of 1875? Can not both stand together? In a case like the present, the act of 1875, as I understand it, would authorize all the plaintiffs or all the defendants, collectively, to remove the whole suit. The act of 1866 authoizes a defendant, not being a citizen of Georgia, to remove the case as to him if there can be a final determination of the controversy, so far as he is concerned, without the presence of the other defendants as parties in the cause. It seems to me that there is no conflict here, no reason why both acts should not stand. I conclude, therefore, that the act of 1866, so far as it authorizes a

defendant to remove a cause as to him, is not repealed by the act of 1875.

And I see no reason why the controversy between the complainants and Moore can not be finally terminated without the presence of the other defendants. Had the complainants filed the bill against Moore alone, he could have demurred to it for want of parties. He had obtained an order to issue a *fi. fa.* for sale of the mortgaged premises, and had issued the writ, and the sheriff had advertised the property for sale. The bill, on the facts alleged in it, would well have lain against him alone to enjoin him from selling the property, and to establish the trust as against his mortgage. The other defendants would have been proper parties, but I think they would not have been necessary parties to the case.

If this view is correct, this controversy between him and the complainants may be determined without the presence of the other defendants as parties in the cause.

The motion to remand the cause is refused.

SEDUCTION—LOSS OF SERVICE—INTERMEDIATE SERVICE — ANIMUS REVERTENDI.

LONG v. KEIGHTLEY.

Irish Court of Common Pleas, May, 1877.

Before MORRIS, C. J., KEOGH and LAWSON, JJ.

1. SEDUCTION—CONFINEMENT IN HOUSE OF THIRD PERSON.—If the relation of master and servant existed at the time of the seduction of the servant, there may be a loss of service, and an action for the seduction may be maintained by the master, although the girl's confinement takes place while she is residing elsewhere than in the house of the plaintiff.

2. ANIMUS REVERTENDI.—Where the relation of master and servant existed at the time of seduction, it is sufficient evidence of loss of service caused thereby to show that a confinement took place in the house of a third person, at a time when either the right to the service was continuing, or, although interrupted by an intermediate contract of service, had again arisen by its determination, the girl seduced having had at such time an *animus revertendi*, but not carrying out her intention in consequence of her impending confinement.

3. CASE IN JUDGMENT.—A girl, of 24 years of age, who, after her father's death, resided with her mother, discharging domestic duties for her, was seduced in her mother's house, on the night previous to her emigrating to America, in pursuance of previous arrangements. She entered into another service on her arrival in America, but subsequently, finding herself pregnant, left that service in order to return home. On her return to Ireland she went to reside in her sister's house, where she remained until her confinement had taken place, a considerable time after which she returned to the house of her mother, who then brought an action for the *eld*, that there was a loss of service, for which the action was maintainable. Joseph v. Corvanden (Roscoe, N. P., 13th Ed., 878), approved. Hedges v. Tagg (L. R., 7 Ex. 283), discussed, and distinguished.

Action for seduction of plaintiff's daughter. Traverses of seduction and service.

The action was tried before Morris, C. J., and a jury, at the Hilary after-sittings, 1877. It appeared that up to the date of the seduction, the plaintiff's daughter (a girl of 24 years of age), had resided with the plaintiff, her mother, who occupied a cottage and small piece of land. Her father, a laborer, had died twelve years previous. She, herself, had made arrangements to emigrate to America. About 12 o'clock on the night of July 18, 1875, she was seduced by the defendant, who was on a visit in her mother's house. In accordance with her previous arrangements, she left Ireland the following day for New York, where, on her arrival, she entered the service of another person, and subsequently gave up that service on finding herself pregnant, and returned to Ireland to the house of her sister, where she was confined. From the date of the seduction, she never returned to her mother's house (which was at a distance of about twelve miles from her sister's), until a considerable time after her confinement.

Counsel for the defendant, at the close of defendant's case, asked for a direction, upon the grounds that—as the girl seduced had, according to her previous arrangements, left the plaintiff's house on the day following the night on which the seduction took place, with the intention of seeking service elsewhere, and never returned to the plaintiff's house until after the confinement—there was no proof of loss of service to the plaintiff; citing Hedges v. Tagg, L. R., 7 Ex. 283. The learned judge refused to accede to their request, but reserved liberty to the defendant to move to enter verdict in his favor if he should have so directed. The jury found for the plaintiff, with £50 damages. A conditional order having been obtained, on behalf of the defendant, that the verdict had for the plaintiff be set aside, and a verdict entered for the defendant pursuant to leave reserved, or that said verdict be set aside and a new trial granted on the ground of being against evidence and the weight of evidence—

O'Brien, Q. C. (with him *M'Laughlin, Q. C.*), for the plaintiff, showed cause. The facts in Hedges v. Tagg, L. R., 7 Ex. 283, are entirely different from those in the present case; there was no service in that case, and the judicial observations which will be here relied on by the defendant, are mere *obiter dicta*, and opposed to the judgment of Lord Denman, in Joseph v. Corvanden, cited at p. 878 of Roscoe's Nisi Prius, 13th Ed. The moment the new service had been determined, the right accrued to the plaintiff to have the service of her daughter, and this is sufficient to entitle her to sustain this action. They cited Terry v. Hutchinson, L. R., 3 Q. B. 599; Dean v. Peel, 5 East, 45; Danes v. Williams, 10 Q. B. 725; Blaymire v. Haley, 6 M. & W. 55; Grinnell v. Wells, 7 M. & Gr. 1033.

Hamilton, Q. C., and *Drummond, contra.* There must have been a relation of master and servant at the time of the seduction, followed by a loss of that service to the plaintiff. Here the loss accrued when the plaintiff's daughter was in the service of a third person, and she did not return to her mother from the day of the seduction until after her confinement, nor was there evidence even of an *animus revertendi*. The plaintiff had no right, at the time of the seduction, to the service of her daughter, who was 24 years of age; and even if the relation of master and servant existed at the time of the seduction, that would not suffice if the confinement, occasioning the loss of that service, took place when the plaintiff was not entitled to her daughter's service. Hedges v. Tagg, L. R., 7 Ex. 283; Thompson v. Ross, 5 H. & N. 16; Manly v. Field, 7 C. B. (N. S.) 96; Rist v. Faux, 4 B. & S. 409.

LAWSON, J.:

In this case it is clearly established that the relation of master and servant existed at the time of the seduction; and the only question is whether there was evidence of loss of service caused by the seduction. Where that relation exists, very slight evidence will be enough to satisfy the requirement that some loss of service is to be shown. The daughter was the servant of her mother, living in her house, and discharging the domestic duties before her departure for America, and that relation drew with it the continued right to her services, unless so far as it was interrupted by another contract. It was argued before us that, even although

the relation of master and servant exists at the time of the seduction, yet if the confinement take place elsewhere there is no loss of service, and no action can be maintained. There is no case deciding any such proposition, and it would be contrary to common sense so to hold, if the daughter leaves her father's house prior to the confinement in order to avoid the shame of being at home; or, if the father sends her away for the same reason, it could not be held that this disentitled him to maintain the action, and that there was no loss of service; for the reasonable inference would be that but for the confinement she would have been at home discharging the domestic duties. The case of Hedges v. Tagg (L. R., 7 Ex. 283), has been strongly relied upon for the defendant, but the second ground mentioned in that case was not necessary for its decision, as there was no relation of service at the time of the seduction to support the action. The daughter in this case left her service in America to return home; the jury might reasonably find that upon her return to Ireland the original service revived, and that she was prevented from returning to her mother's home by reason of her impending confinement, and that, therefore, was the cause of the mother not having her services on her return. The reasonable inference was that she returned intending to go back to her mother, but was prevented from carrying out that intention by this circumstance; and she does return home in pursuance of her original intention as soon as that circumstance was removed. The manuscript note of Lord Denman's decision, in Joseph v. Corvander, referred to by Mr. Roscoe, appears to us to contain a correct statement of the law. The cause shown must be allowed.

Morris, C. J., and Keogh, J., concurred.

CONDITIONAL ORDER DISCHARGED.

NOTE BY THE EDITOR OF THE IRISH LAW TIMES REPORTS.—"The action was held to lie, though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovery of her pregnancy. *Per* Lord Denman, C. J., Joseph v. Corvander, Winton Sum. Ass., 1834." It has more than once been held in Ireland that the action lies before the actual confinement has taken place. Towers v. Nugent; Cannock v. Lynch. And see Quinlan v. Barber, Batt. 47. In an American case—Abrahams v. Kidney, 104 Mass. 222—the Supreme Court of Massachusetts held in 1870, on a bill of exceptions, that a ruling to the effect that an action for seduction can not be maintained unless it is followed by pregnancy or sexual disease, is erroneous. Morton, J., said: "The rule which governs the numerous cases on this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action, where the connection causes pregnancy or sexual disease, applies to all cases where the proximate consequence of the criminal act is a loss of health, resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or actual disease, causes bodily injury, impairing the health of the servant, and resulting in a loss of services to her master. So the criminal connection may be accomplished under such circumstances—as, for instance, violence or fraud—that its proximate effect is mental distress or disease, impairing her health, and destroying her capacity to labor. In either of those cases the master may maintain an action, because the loss of service is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. Vanhorn v. Freeman, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes—such as abandonment by the seducer, shame resulting from exposure, or other similar causes—the loss of service is too remote a consequence of the criminal act and the action can not be maintained. Boyle v. Brandon, 13 M. & W. 738; Knight v. Wilson, 4 Kern. 413. In the case at bar, as the ruling appears to have been general, that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted."

In Kennedy v. Shea, 110 Mass. 147, before the same court, in 1872, it appeared, in an action for seducing the plaintiff's *minor* daughter, that she was employed by a third person, but that the plaintiff, her father, required her (and she was permitted under her contract with the third person) to spend a part of every Sunday at home, and that while there she did work for him; and it was held that she was his servant, so that she could maintain the action. Ames, J., said: "In order to maintain an action of this description the plaintiff is required to prove that the relation of master and servant between himself and his daughter existed, either in fact or constructively, at the time of the seduction. According to numerous decisions of the courts of New York, Pennsylvania, and some other states of our Union, this relation is sufficiently proved by evidence that the daughter was a minor, and that the father had a right to her services. Those decisions, also, lay down the rule that the effect of such evidence is not impaired by the fact that at the time of the injury she was not living in her father's family, but was in the actual employment of another person. It was held that such a fact would not justify the inference that the father had abandoned any of his paternal rights, unless the daughter had been actually bound out as an apprentice. In other words, the relation results constructively from his right to claim the custody of her person, from his responsibility for her education, and from his obligation to support her if she should become sick or disabled while so absent from her home. * * * The rule adopted in the English courts apparently requires that the relation of master and servant should be proved with greater strictness where the daughter does not reside under the paternal roof; and according to Thompson v. Ross, 5 H. & N. 16, the action can not be maintained if, at the time of the seduction, she was a domestic servant in a family other than that of her father. But it is well settled, even under the English rule, that the amount and value of the actual service to the father are of but little importance, and that any service, however slight, is sufficient. Bennett v. Allcott, 2 T. R. 116. It is enough if the father had a right to her service, and if some service was rendered. The case finds that he was entitled to her services a portion of every week, and that she was actually employed, on Sundays at his house, in cooking and other domestic work, upon his requirement. If so, her entire service did not belong to her employer, Warner, and the action could well be maintained even under the English decision. See judgment of Bramwell, B., in Thompson v. Ross, *ubi supra*. The evidence which was admitted under objection, as to the fact that the daughter lived and rendered services in her father's family for about two weeks, several months after the seduction, although, perhaps, open to objection as immaterial, can not have had any effect upon the verdict, and has not any bearing upon the plaintiff's right to recover. The jury was instructed that the relation must be proved to have existed at the time of seduction." In a subsequent case, Furman v. Van Sise, 56 N. Y. 435, the New York Court of Appeals, in 1874, held (*diss.* Allen, J.) that, after the father's death, the mother of an *infant* daughter would have a similar right to her services, and could therefore maintain an action for her seduction, even though she is in the actual service of another person at the time of the seduction. Grover, J., said: "It is well settled that the father of a minor daughter, seduced while in the service of another, may maintain an action for the injury, provided he retains the right of recalling her into his services. It follows that the mother has the same right, provided she has the right to the services of the daughter; one ground for maintaining the action being a real or supposed loss of services of the daughter. To sustain the action upon this ground the relation of master and servant must, in fact, exist between the plaintiff and the female seduced, or constructively by the plaintiff having the right to her services." He then inquires into the basis of the father's right to the services of his minor children, referring it to the obligation imposed on him to maintain, educate, and protect the child during infancy and early youth until it is able (at 21) to provide for its own maintenance. He cites Kent's Com. pp. 188, 189, 225, and Gray v. Durland, 50 Barb. 100, and concludes that the mother is under a like obligation, and therefore possesses a similar right. In Howland v. Howland, 114 Mass. 517, 1874, it was held that evidence that the plaintiff's marriage with his reputed wife was void, is, in an action for the seduction of his reputed daughter,

admissible on the defendant's part, to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services.

It may be added that, by the laws of the state of Georgia, seduction is treated as a most heinous crime, and is punished with the longest period of penal servitude known to the code, except that of perpetual imprisonment. Commenting on that statute, M'Cay, J., says: "If the crime be in fact committed, this is a most just and salutary law since it is hardly possible to conceive of a more base and dastardly deed. It is a grievous wrong done by a selfish, heartless villian against a helpless and innocent victim, and it is most justly denounced by all good people as a fiendish offense against God and against society. The man who is guilty of it has betrayed and ruined a *woman*—has, by artful and fraudulent practices, seduced her from the paths of virtue, inspired her with lustful desires, and, finally, led her perhaps, at last, a willing victim to crime. It is this deliberate, fraudulent, artful leading into crime of a trusting, pure-minded girl from chaste thoughts and pure desires, that gives such *moral turpitude* to the offense. Of the actual fornication both are guilty—guilty even under human laws—and both are subject to the same penalty. It is the *seduction* of the woman by the man that gives the gist of, gives the name to, and makes the heinousness of this offense;" Wood v. State, 48 Ga. 192—1873.—E. N. B., *Ed.* [See also 1 Cent. L. J. 538.—Ed. C. L. J.]

NEGLIGENCE—LIABILITY TO STRANGERS.

PITTSBURG, FORT WAYNE AND CHICAGO R. R. v. BINGHAM.*

Supreme Court of Ohio.

A railroad company is not liable for an injury to a person resulting from its failure to exercise ordinary skill and care in the erection or maintenance of its station-house, where, at the time of receiving the injury, such person was at such station-house by mere permission and sufferance, and not for the purpose of transacting any business with the company or its agents, or on any business connected with the operation of the road.

ERROR to the District Court of Stark County.

The original action was brought by the defendant in error as the personal representative of her deceased husband, Wallace B. Bingham, against the plaintiff in error, under the act requiring compensation to be made for causing death by a wrongful act, neglect, or default, passed March 25, 1851. 2 S. & C. 1139.

The deceased was at the plaintiff's station-house in Massillon, on December 5, 1870, and while there was struck by a portion of its roof, torn off by wind, and blown, during a violent storm, from the building, with such force against and upon him as to cause his death. The plaintiffs in error—one the owner of, and the other the lessee operating the railroad—were charged with the wrongful act and neglect alleged to have resulted in the death of Bingham, consisting in negligence in the construction and maintenance of said station-house, the plaintiff below claiming it to have been defectively and unskillfully constructed, and maintained and used in an unsafe and insecure condition.

Issue was joined upon the question of negligence, and the cause submitted to a jury. Upon the trial, evidence was given which tended to show that the deceased, on the day and at the time of receiving the injury resulting in death, was at said passenger depot or station-house, not for the purpose of transacting any business with the company, its agents or servants, or with any one rightfully there, nor on business in anywise connected with the operation of the road; but, being out of employment, was there for pastime or pleasure, or as a place of safety during the continuance of what appears to have been a violent storm. After the testimony was concluded, the court instructed the jury, in substance, that if the deceased was at, in, or near said depot, not on any business, but "was there by the tacit permission of, and without objection from," the company operating the road, "its agents or servants, and there peaceably and innocently, relying upon such station-house as a place of security," and was free from negligence contributing to his injury and consequent death, and ordinary care and skill were not employed in the construction and maintenance of the station-house, but from want of such care and skill it was defectively and insufficiently constructed, and imprudently and negligently maintained and used, and by reason thereof the deceased lost his life, the company was liable. The defendant below excepted to that part of the charge that held it to be the duty of the company to have exercised due care in the construction and maintenance of the building, if the deceased entered and was there by "mere permission and without objection;" and from a judgment against it, carried the cause to the district court, where the judgment of the common pleas was affirmed. A petition in error is now prosecuted here to reverse both judgments. Only so much of what occurred at the trial is stated as is necessary to show the relevancy of the question considered and decided.

J. T. Brooks, for plaintiff in error:

The duty upon the part of the defendants to exercise care towards the plaintiff depended upon the question whether the plaintiff was in the exercise of a legal right at the time of the injury. And it made no difference that he may have been there by the *silent permission* or *license* of the defendants. If he was not there by legal right, he took the premises *as he found them*, with all the concomitant perils. Sweeny v. Old Colony, etc., R. R. Co., 10 Allen, 368, 372; 1 Redf. on Railways, 474, sec. 126, par. 15; Zoebisch v. Tarbell, 10 Allen, 385; Griffiths v. L. & N. W. R. R. Co., 14 Law Times (N. S.), 797; S. & R. on Neg., sec. 447 and notes; Bancroft v. B. & W. R. R. Co., 97 Mass. 275; Wharton on Neg., sec. 352; Gillis v. Penn. R. R. Co., 8 Am. Law Reg. (N. S.) 729; 59 Penn. St. 129; 22 How. (U. S.) 461; 24 *Ib.* 307; 2 Curtis C. C. 141; 9 Wall. 146; 2 Har. 481; 3 Blatch. C. C. 37, 276, 517; 14 N. H. 307; S. & R. on Neg., secs. 308-310; Kay v. Penn. R. R. Co., 65 Penn. St. 269.

W. A. Lynch, for defendant in error:

Did the court err in permitting a recovery if the jury found Bingham at the depot by the tacit permission of, and without objection from the defendant, the Pennsylvania Railroad Company, its servants or agents, if there peaceably and innocently, relying upon such station-house as a place of security?

The whole argument turns on the question: Did the company owe any duty to any one at the depot, as supposed by the proposition above stated? It is claimed that it owed to such a one no duty, and therefore negligence can not be alleged. I admit there is, in such case, no duty depending on contract, or growing out of any special relation or privity between the parties; but the law recognizes many duties of property-owners independent of such relation or privity. Callahan v. Warne, 40 Mo. 135; Johnson v. Patterson, 14 Conn. 1; Kerwhacker v. R. R. Co., 3 Ohio St. 172; 65 Penn. St. 269; Young v. Harvey, 16 Ind. 314; 44 Penn. St. 375; 7 Metc. 602; 1 Duer, 571; 66 Penn. St. 345; Baker v. Portland, 58 Me. 199; Spofford v. Horton, 3 Allen, 176; Welch v. Wesson, 6 Gray, 505; Steele v. Burkhardt, 104 Mass. 59; Kearns v. Lowdon, *Ib.* 63; Hall v. Corcoran, 107 Mass. 251; Sutton v. Wanwatosa, 29 Wis. 21.

BOYNTON, J., delivered the opinion of the court:

We find in the record of the present case, among the questions argued, but one deserving consideration, and that one may be stated as follows:

"Is a railroad company bound to exercise ordinary care and skill in the erection, structure, or mainte-

* From advance sheets of 29 Ohio St.

nance of its station-house or houses, as to persons who enter or are at the same, not on any business with the company or its agents, nor on any business connected with the operation of its road, but are there without objection by the company, and therefore by its mere sufferance or permission?" We must give to this question a negative answer. A careful examination of the adjudged cases bearing on the point has led to the discovery of none supporting, much less sustaining, the proposition contended for by the defendant in error. The question in its legal bearings is kindred to to the one decided and settled in a class of cases, of which Hounsell v. Smith, 7 C. B. (N. S.) 731, is an example. In that case the plaintiff fell into a quarry, left open and unguarded on the uninclosed waste lands of the defendant, over which the public were permitted to travel. In an action for the injury, it was held that the owner was under no legal duty or obligation to fence or guard the excavation, unless it was so near to a public road or way as to render it dangerous to travel thereon. The court say: "The person so traveling over such waste lands must take the permission with its concomitant conditions and, it may be, perils." That an owner is not liable for an injury from pitfalls or excavations to one who enters his premises uninvited, and by mere license or permission, is well sustained by the authorities. 3 Best & Sm. 244; Hardcastle v. The South Yorkshire Ry. Co., 4 Hurlst. & N. 67; Sweeny v. Old Colony and Newport R. R. Co., 10 Allen, 372; Knight v. Abert, 6 Barr, 472; Roscoe's Ev. at Nisi Prius, 719.

In Southcote v. Stanly, 1 Hurlst. & N. 247, L. J. 25 Ex. 339, a visitor at defendant's house was injured by the falling of a glass door, through the negligence of the defendant. It was held that the plaintiff having, *pro hac vice*, become an inmate of the defendant's family, a rule similar to that of fellow-servants applied. In Peirce v. Whitcomb, 48 Vt. 127, plaintiff and defendant went to defendant's barn, at night, to measure up some oats, which the defendant sold to the plaintiff for the latter's accommodation, having none he wished to sell. While the defendant was looking for a measure, the plaintiff, walking about the barn in the dark, fell through a hole in the floor, and was injured. It was held he could not recover.

But, if such dangerous place or pitfall or excavation is by the side of a public road or footway, along or over which the public have the right and are accustomed to travel, it becomes the duty of the owner to adopt suitable and reasonable precautions to guard the public against injury resulting from the proximity of such dangerous place to the highway thus rightfully enjoyed. Barnes v. Ward, 67 Eng. C. L. 393; Firmstone v. Wherley, 2 D. & L. 208, Pollock, B.; Corby v. Hill, 4 C. B., (N. S.) 556; Hargreaves v. Deacon, 25 Mich. 5; Young v. Harvey, 16 Ind. 314; Mullen v. St. John, 57 N. Y. 567. Or, if a structure is erected near the line of another's land, and falls over on it to his injury, the owner of the structure is liable. Schwarts v. Gilmore, 45 Ill. 455; Shearm. & Redf. on Neg., par. 498.

The principle underlying the cases above cited recognizes the right of the owner of real property to the exclusive use and enjoyment of the same without liability to others for injuries occasioned by its unsafe condition, where the person receiving the injury was not in or near the place of danger by lawful right; and where such owner assumed no responsibility for his safety by inviting him there, without giving him notice of the existence or imminence of the peril to be avoided. In such cases, the maxim *sic utere tuo ut alienum non lædas*, is in no sense infringed. In its just legal sense it means "so use your own property as not to injure the *rights* of another." Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong.

Actionable negligence exists only where the one whose act causes or occasions the injury owes to the injured person a duty, created either by contract or by operation of law, which he has failed to discharge. In Burdick v. Cheadle, 26 Ohio St. 393, the owner of a store building had leased it to a tenant, who was in the occupancy of the same, selling goods therein. Certain shelvings and fixtures, not properly secured, fell, and injured the plaintiff, a customer of the tenant, for which injury the customer brought an action against the landlord. It was said by McIlvaine, J., that there was no privity between the owner of the property and the plaintiff, and that the former owed no duty to the latter which was violated by a careless construction or fastening of the fixtures; and that the fact that the room was to be kept open to the customers of the tenant did not affect the question.

But the question naturally arises, to what extent does the right of a railroad company to the control and use of its real property differ from that of a general owner of land not burdened or incumbered with a public charge? What restrictions and limitations are imposed upon the use and enjoyment of the real property of the company that do not exist in the case of the ownership of property not employed for public purposes? The questions are not difficult to answer. The right to the possession and control of the property of a railroad corporation for all purposes contemplated by its character, and to enable it to accomplish the objects for which it was created, is indispensable to the proper discharge of the duties it owes to the public. By accepting a grant of corporate power from the state, it bound itself to do and perform certain things conducive to the public welfare. And those things consist principally in the duty to carry and transport persons and property from one point on its road to another, under such reasonable rules and regulations as it may prescribe to itself, or as may be prescribed by more general law. The obligation to carry, thus assumed, can not be disregarded or rejected at pleasure. It is an indispensable condition to the right to exercise corporate functions. The duty to carry is correlative to the existence of the corporate power of the company, and ceases only with a surrender of its corporate privileges. It is, therefore, a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, can not be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as is that of an owner of real property not burdened with public or private easements or servitudes.

The case of Nicholson, Administratrix, v. The Erie Railway Co., 41 N. Y. 525, rests upon this principle. The company had left on a branch track four empty cars and one loaded one. The brakes to the four cars were not set or secured, and they were started by a violent wind and ran against the loaded car, propelling it forward and causing it to run against and over the plaintiff's intestate, who was up on the track, killing him. The place where the branch track was constructed, was open and unfenced, and was customarily used by the people in the vicinity as they had occasion to use it, without objection by the company. The court instructed the jury that it was the duty of the

company to set the brakes, and that if it left the cars without doing so, or otherwise securing them, it was a violation of duty on its part. This instruction was held erroneous. It is said in the opinion that no relation existed between the company and the deceased creating any particular duty, and that the company "had the same unqualified right which every owner of property has, to do with his own as he pleases, and keep it and use it where and as he pleases, on his own ground, up to the point when such use becomes a nuisance."

It is doubtless true that a railroad company, by erecting station-houses and opening them to the public, impliedly license all persons to enter. But it is equally true that such license is revocable at the pleasure of the company as to all persons who are not there on business connected with the road, or with its servants or agents. Commonwealth v. Powers, 7 Met. 596; Nicholson v. The Erie Railway Company, *supra*, 532. In Harris v. Stevens, 31 Vt. 90, it is said: "The right to enter (a depot) and remain, exists only by virtue of, and as incident to the right to go upon the trian, and it is to be extended so far only as is reasonably necessary to secure to the traveler the full and perfect exercise and enjoyment of his right to be carried upon the cars." An implied license to enter a depot creates no additional duty upon the part of the company as respects the safety of the building entered. Its only effect is to make that lawful which, without it, would be unlawful. Wood v. Leadbitter, 13 M. & W. 838. It is a waiver or relinquishment of the right to treat him who has entered as a trespasser.

In Sweeny v. Old Colony and Newport Railroad Company, 10 Allen, 372, the court say: "A licensee, who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, can not recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not expressly invited to enter, or induced to come upon them by the purpose for which the premises are appropriated or occupied." The inducement here spoken of must be equivalent to an invitation to enter. Carlton v. Franconia Iron and Steel Co., 99 Mass. 216. Mere permission is neither inducement, allurement, nor enticement.

The case of Tobin v. The P. S. & P. R. R. Co., 59 Maine, 183, cited by defendant's counsel, instead of supporting the defendant's claim, sustains the opposite. The plaintiff was a hackman, carrying passengers to the cars, and while stepping from his carriage to the platform, was injured by a defect in the latter, occasioned by a want of ordinary care in the company. a recovery was sustained, on the ground that a "hackman carrying passengers to the railroad depot for transportation, and aiding them to alight upon the platform of the company, is as rightfully upon the same as the passengers alighting." A recovery was also sustained in Toledo, Wabash and Western Railway Co. v. Grush, 67 Ill. 262, for an injury to the defendant, resulting from stepping accidentally through a hole in the platform, carelessly left open, the defendant being at the depot looking for freight belonging to his employer. The case of Gillis v. Pennsylvania Railroad Co., 59 Penn. St. 129, fully sustains the position and claim of the plaintiffs. It was there held that the platform of a railroad company, at its station, is in no sense a public highway; that it is not dedicated to public use; that it is for the accommodation of passengers, but, being uninclosed, persons have the privilege, but not the legal right of walking over it for other purposes; and that "the owner is not liable to a trespasser, or one who is on his property by mere permission or sufferance, for negligence of himself or agents." Applying the principle thus settled to the present case, it leaves but little doubt that the court was in error in holding the company to such a measure of care, or to such a rule of responsibility. In the circumstance supposed—the presence of the deceased at the depot by the mere sufferance or permission of the company—it was under no legal obligation to protect him from danger, not known to exist, although the unsafe condition of the building that gave rise to such danger was a consequence of a failure to exercise ordinary care, prudence, and skill in its structure or in its maintenance. Carlton v. Franconia Iron and Steel Co., 99 Mass. *supra*.

His presence at the depot was uninvited, and the company did not owe to him the duty to keep its station-house in a safe and secure condition. Its negligence, if any, was necessarily negligence of omission, negligence in having omitted the the exercise of ordinary care to ascertain the dangerous character of the building. If the question was between the company and its employees, whose duty it was to occupy the building, or if it arose between the company and those who came to take passage on its cars, or to accompany a friend about to depart, or to await the arrival of one expected, or to engage in any business connected with the operation of the road, or business with those engaged in its service, and having a legal right to be and remain there; or, if the company had possessed knowledge, in fact, of the dangerous character or condition of the building, and gave no notice thereof to those it permitted to enter or occupy, other considerations would arise. It, however, is not charged with intentional wrong, nor with that gross or reckless misconduct that is difficult to distinguish from it, and therefore is equivalent to it. All it could have done, when the storm approached, to save the deceased from harm, was to see that he left the building, and thereby escaped the danger. This was not a legal duty. He was injured by no act of the company, or its servants or agents, occurring at the time. The fault was of past origin, and negative in character, consisting in not previously overhauling the building, ascertaining its defects and weakness, and supplying the needed strength and support. For this omission, or its resulting consequences, a stranger has no right to call it to account.

Judgment of the district court and of the common pleas reversed, and cause remanded.

BANKRUPTCY—PENALTIES—JURISDICTION OF STATE COURT.

ORDWAY *ET AL.* v. THE CENTRAL NATIONAL BANK OF BALTIMORE.

Court of Appeals of Maryland, April Term, 1877.

HON. JAMES L. BARTOL, Chief Justice.
" J. A. STEWART,
" J. M. ROBINSON,
" RICHARD GRAYSON,
" RICHARD H. ALVEY,
" OLIVER MILLER,
" RICHARD J. BOWIE,
} Associate Justices.

1. A RESOLUTION TO GO INTO LIQUIDATION, together with a certificate of discharge from liability for circulating notes, does not operate to dissolve a national bank so that no judgment can be rendered against it.

2. ACTION AGAINST NATIONAL BANK FOR PENALTY—JURISDICTION OF STATE COURT.—A state court may en

tertain an action of debt against a national bank to recover double the amount of interest unlawfully taken by it.

3. DISTINCTION BETWEEN REMEDIAL PENALTY AND PUNISHMENT.—There is a distinction between a remedial penalty given the party aggrieved and a penalty prescribed as a criminal punishment, and a state court may entertain an action to recover the former, although it is given by an act of Congress.

4. PENALTIES—EXCLUSIVE JURISDICTION OF FEDERAL COURTS.—The penalties and forfeitures, of which exclusive jurisdiction is given to the federal courts by section 711 of the Revised Statutes, contemplates only those penalties and forfeitures of a public nature which may be sued for by the government or some person in its behalf.

Marshall & Fisher, for appellants; *Machen & Gittings* and *Geo. H. Williams*, for appellee.

ALVEY, J., delivered the opinion of the court:

If it be true, as suggested by the appellee, that the corporation was actually dissolved at the expiration of six months from the 15th of July, 1874, then, of course, this action must abate; for it is perfectly well settled that a suit can no more be prosecuted and judgment recovered against a dead corporation than against a dead man. Mumma v. The Potomac Co., 8 Pet. 281; Nat. Bank v. Colby, 21 Wall. 615.

But has the corporation been dissolved? We think not. It has suspended active operations as a banking association—has resolved to go into a state of liquidation—has deposited the money with the treasurer of the United States, with which to redeem its outstanding circulation, and has received, by re-assignment, its bond deposited to secure the payment of its notes, and it thenceforth stands discharged from all liability on account of such circulating notes, but the statute has not declared that these acts, of their own mere operation, shall effect an absolute and total dissolution of the corporation. And it would be strange if such were the case. There are many other obligations to be provided for beside the circulating notes, and there may be many rights to be protected which would require the continued existence of the corporation. It is not resonaable to suppose that Congress intended that, upon simply resolving to go into liquidation, and providing for the redemption of its circulating notes, the banking association should be dissolved. If by such acts it were dissolved, all actions by or against it would abate, and parties might be left utterly without remedy for the enforcement of the plainest right or recompense for the most grievous wrong.

As we read the sections 5221, 5222, 5223 and 5224, of the Rev. Stats., no such result was ever contemplated. On the contrary, those sections would seem plainly to contemplate the continued existence of the corporation after the re-assignment of the bonds, and the certificate of discharge from the liability for the circulating notes of the banking association; and such would seem to be the construction of the Supreme Court of the United States in the cases of Kennedy v. Gibson, 8 Wall. 498, 506, and Bank of Bethel v. Pahquioque Bank, 14 Wall. 383, 398. There has been no actual and formal surrender of franchises, and no judicial declaration of dissolution; and acts of a more decisive character than those relied on in this case have been held to be insufficient to operate a final dissolution. State v. Bank of Md., 6 Gill & Johnson, 265; Brinkerhoff v. Brown, 7 John. Ch., 217; Boston Glass Manuf. Co. v. Langdon, 24 Pick. 49; Ang. & Am. on Corp. sec. 773. It would seem, therefore, that the learned judge below was entirely correct in holding that there had been no abatement of the action by dissolution of the corporation.

The next question to be considered is that raised by the demurrer to the appellant's amended declaration; and that is, whether the action can be sustained in the courts of this state, the action being founded on a statute of the United States?

The action is one of debt, brought by the appellant against the appellee, under the 30th section of the national banking act, approved June 3, 1864, to recover double the amount of interest unlawfully taken by the appellee. In the section referred to, it is provided that the knowingly taking, receiving, reserving or charging a rate of interest greater than the rate fixed by the previous part of the section, "shall be held and adjudged a forfeiture of the *entire* interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association, taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred." The recited provision constitutes section 5198 of the Rev. Stats. U. S., page 1012, which went into operation June 22, 1874. The causes of action set forth in the declaration arose in the year 1873, and the suit was brought as of July 25, 1874.

The 57th section of the banking act, under which the appellee was organized, and which was in force at the time of the transaction out of which the causes of action arose, provided "that suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction *in similar cases.*" This provision of the act of 1864 was omitted in the Rev. Stat.; but in that revision, by section 5597, it is provided that "the repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before said repeal, but all rights and liabilities under said acts shall continue, and may be enforced *in the same manner as if said repeal had not been made.*" And in the next succeeding section, 5598, it is further provided that "all offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made." This latter section, manifestly, has reference to public prosecutions alone. In this case the cause of action is a forfeiture, a penalty of a civil nature, for the exacting and taking of usurious interest upon money loaned, and the remedy given by the statute is by private civil action of debt to the party grieved. The government or the public is not concerned with it. It is, therefore, a private right, pursued by a private civil action. And it has been decided that the section of the statute upon which the action is founded is remedial as well as penal, and it is to be liberally construed to effect the object which Congress had in view in enacting it. Farmer's Nat. Bank v. Dearing, 91 U. S. 29, 35.

This is not unlike in principle the case of debt brought by a landlord against his tenant for double value for not quitting in pursuance of notice given, under statute, 4 Geo. 2, c. 28. In such case, because the penalty or forfeiture prescribed by the act is made to accrue to the party grieved, and to be recovered by private action of debt, the courts have taken a distinction between such penalty and a penalty prescribed as criminal punishment, and hold the statute to be remedial. Wilkinson v. Colley, 5 Barr, 269; Lake v. Smith, 4 Bos. & Pul. 174. In the last case referred to, being an action of debt on the statute, Heath, J., said: "The double value has been called a penalty, and it is

so in some degree, but the law is also a remedial law." And Rooke, J., observed: "The act indeed does give a penalty, but it is to the party grieved, and this is a distinction which has often been taken between remedial and penal laws." The action of debt is an ordinary common law remedy, and it lies in the courts of this state, having general common law jurisdiction, as the court in which this action was instituted, on statutes at the suit of the party grieved, either where it is expressly given to such party, as by the statute under consideration, or where a statute prohibits the doing an act under a penalty or forfeiture to be paid to the party grieved, and there is no specific mode of recovery prescribed. This is the well-established doctrine in England, (1 Chitty Pl. 112, and authorities there cited), and it is the law here. There is, therefore, no question but that the court below has jurisdiction in similar cases to that provided for by the statute under which this action was brought.

But it is contended, that notwithstanding the comprehensive and explicit terms employed in section 57 of the act of 1864, c. 106, giving the right to sue in state courts, inasmuch as the cause of action is a penalty or forfeiture, the remedy can only be sought in the federal tribunals. It is contended, 1st, that the language of the 57th section should be construed with reference and in subjection to the pre-existing law, and that by the pre-existing law the jurisdiction of the state tribunals in such case as the present, was excluded by express provision of the statute; 2d, if such construction be not adopted then, that the savings in the Revised Statutes do not embrace the right to sue in a state court in a case like the present; and 3d, that though the statute may confer the right, Congress has no constitutional power to give the state courts cognizance of penal actions, and those courts should refuse to take such cognizance.

The argument in reference to the first proposition, that is, on the construction of the 57th section of the national banking act, is founded upon the 9th section of the judiciary act of 1789, 1 St. 76, wherein the jurisdiction of the district courts of the United States is defined. In that section of the judiciary act it was declared that the district courts should have, *exclusively of the courts of the several states*, cognizance of all crimes and offenses that were cognizable under the laws of the United States, committed within their respective districts, etc.; and, among other subjects of jurisdiction, it was declared that such district courts should "have *exclusive original cognizance* of all seizures on land or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States." This latter provision, in regard to penalties and forfeitures, has been inserted in the Revised Statutes in section 711, in defining the jurisdiction of the United States courts that is exclusive of the courts of the several states.

Now, looking at the broad, unqualified language employed in section 57 of the act of 1864, there would seem to be no doubt but that it was the design of Congress that the state courts should take cognizance of actions like the present, as well as all other civil actions against banking associations, and that, if it had been the design to exclude the state courts in such cases, appropriate terms would have been employed to express the intention, as in other acts of Congress when conferring jurisdiction. And though the particular provision has been omitted from the Revised Statutes, yet the saving, by section 5597, is ample to continue the jurisdiction in the state courts, as to all transactions occurring before the Revised Statutes were adopted. It is expressly provided, that all rights and liabilities under said act shall continue, and may be enforced *in the same manner as if said repeal had not been made.* But if it were conceded that such construction is erroneous, then the question would arise, what is the proper construction of that provision in the Revised Statutes in reference to the exclusive jurisdiction of the Federal courts of all suits for penalties and forfeitures, which was taken from the judiciary act of 1789? And, in answer to this question, it would seem to require no strained construction to warrant the conclusion that that provision of the statute has no application to this case whatever; that it has reference to, and contemplates only those penalties and forfeitures of a public nature, which may be sued for by the government, or some person in its behalf. And this construction is strongly enforced by several provisions to be found in the Revised Statutes—such as that which requires the district attorneys to furnish statements of all suits instituted by them for the recovery of any fines, penalties or forfeiture—sec. 772. There is great reason for confining suits of that character to the Federal jurisdiction, but none, it would seem, for excluding the state jurisdiction in a case like the present, where the right is private, and is being pursued by a private civil action by the party grieved.

Having shown that there is nothing in the statute of the United States to exclude the state jurisdiction in a case like the present, the question is, 1st, whether, in the absence of express terms conferring jurisdiction on the state courts, those courts have jurisdiction to enforce a right under a statute of the United States, in a case of the character now under consideration? and if not, 2d, whether Congress can rightfully, by express terms, confer such jurisdiction?

The position and argument of the appellee, if sustained, would result in both these questions being resolved in the negative. If, however, either be resolved in the affirmative, the judgment appealed from must be reversed. The question of the concurrent jurisdiction of the state courts with those of the United States, has been the subject of a good deal of discussion both by statesmen and the courts of the country. It was one of the objections urged against the adoption of the Federal constitution, that it would detract from and materially impair the existing jurisdiction of the state courts. This objection was answered by Mr. Hamilton in the 82d number of the Federalist, in which he maintained that the Congress of the Union, in the course of legislation upon the objects entrusted to their direction, might or might not commit the decision of causes arising upon the regulation of any particular subject, to the Federal courts solely, but that, in every case in which the state courts are not expressly excluded by the statutes, they would of course take cognizance of the causes to which those acts might give origin. This he inferred from the nature of judiciary power, and from the general genius of the system. And Chancellor Kent, taking the same view of the subject, and after a full review of the course of decisions, state and Federal, down to the time he wrote, concludes that, in judicial matters, the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter. 1 Kent Com. 396-400. The reasoning of the two distinguished writers just mentioned has remained without refutation; and without restatement of their arguments or an attempt to review the decisions upon the subject, it is sufficient to refer to the recent case in the Supreme Court of the United

States, which would seem to conclude the very question now under consideration.

The case to which we refer, is that of Claflin v. Houseman, assignee, 93 U. S. 130; 3 Cent. L. J. 803. In that case, the action was brought in a state court by an assignee in bankruptcy to recover against the defendant an amount of money which the latter had collected on a judgment recovered against the bankrupt within four months before the commencement of the proceedings in bankruptcy. The defence taken was, that inasmuch as the assignee was a creature of an act of Congress, and derived all his rights and powers from the bankrupt act, and the right to recover was exclusively referable to that statute, the action could not be sustained in a state court, but should have been brought in a court of the United States. This was the only question considered by the court, and the opinion was unanimous that the state court had complete cognizance of the action. It was there held that, inasmuch as the bankrupt act gave no exclusive jurisdiction to the courts of the United States, the assignee might well maintain a suit in the state court to recover the assets of the bankrupt; and further, that the statutes of the United States, made in pursuance of the constitution, are as much the law of the land in the states as the statutes of the states can be, and although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet where it is not given, either expressly or by necessary implication, the state courts, having competent jurisdiction in other respects, may be resorted to for the enforcement of rights under such statutes.

The whole subject is well reasoned in the opinion, and the decisions reviewed, and the court very justly observe that when the structure and true relations of the Federal and state governments are considered, there is really no foundation for excluding the state courts from the exercise of such jurisdiction. In discussing the relation of the two governments, and the operation of the laws of the Union, the court say: "The laws of the United States are laws in the several states, and just as much binding on the citizen and courts therof as the state laws are. The United States is not a foreign sovereignty as regards the several states, but is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a state is a subject of two distinct sovereignties, having concurrent jurisdiction in the state,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws, may be prosecuted in the state courts; and also, if the parties reside in different states, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts competent to decide rights of like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction."

And again, in pursuing the argument, it is said: "This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws, is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. That case leaves nothing to be said as to either aspect of the question here involved; and, therefore, whether the right to maintain this action be placed upon the express terms of the statute giving cognizance to the state courts, or simply upon the non-exclusion of state jurisdiction, in either case the action is maintainable. And that the cause of action is a penalty, to be recovered in a civil action of debt by the party grieved, constitutes no objection to the state court's taking cognizance of it and enforcing the right."

The case of the First National Bank of Plymouth v. Price, 33 Md. 487, has no similitude to the present. In that case the penalty was given by a statute of Pennsylvania, and the decision proceeded upon the principle that, as the law had no extra-territorial operation, the courts of one state will not enforce penalties imposed by the laws of another. But, as has been clearly shown, no such reason or principle applies as to the laws of the United States, when sought to be enforced in the courts of the several states. The constitution and laws of the Union are the supreme law of the land, and are as much a part of the law of each state, and as binding upon the courts and people as its own local constitution and laws.

From what has been said it follows that the demurrer, so far as it is grounded upon the want of right or power in the court to take cognizance of the case, must be overruled.

There are certain other objections raised under the demurrer to the amended declaration, of a purely technical character; but these objections appear to be without any substantial foundation, and therefore may be dismissed without comment. For the reasons assigned, the judgment of the court below must be reversed, and the demurrer overruled, and the cause remanded to be proceeded with in regular course.

Judgment reversed and cause remanded.

NOTE.—The provision, "that suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any state, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases," has been added as an amendment to section 5198 of the Revised Statutes of the United States, by an act passed February 18, 1875. The statute law upon the principal point discussed in the foregoing opinion is, therefore, the same now as it was in the act of June 3, 1864.

In Martin v. Hunter, 1 Wheat. 304, the Supreme Court had occasion to consider the proper construction of that part of the Constitution pertaining to judicial power, and in the course of the opinion said: "No part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals." In cases of crimes and offenses against the laws of the United States, this doctrine has always been strictly adhered to. State v. McBride, Rice, 400; State v. Wells, 2 Hill (S. C.), 287; Comm. v. Reily, 1 Va. Cas. 321; State v. Pike, 15 N. H. 83; Huber v. Reilly, 53 Penn. 112. The reason for the doctrine is, that there can be no crime against the United States unless the act is made such by some statute. The state courts, therefore, could not have had jurisdiction over such causes prior to the adoption of the Constitution, and Congress can not confer such jurisdiction upon them, since by the terms of the Constitution it can vest judicial power only in courts created by itself.

Upon the question, whether the state courts can entertain actions to recover penalties allowed by the laws of the

United States, or not, the decisions have been conflicting. By the act of August 2, 1813, ch. 39 (3 Stat. 72), a penalty was allowed to be recovered in the name of the United States, or of the collector,—one-half to the use of the United States, and the other half to the informer. A judgment was recovered for the penalty in a state court, the defendant imprisoned and allowed to give a gaol bond. In an action upon the gaol bond for an escape, it was held that such judgment could not be impeached collaterally. United Stearns v. U. S., 2 Paine, 300. By the act of April 19, 1816, ch. 57 (3 Stat. 289), a penalty was imposed for a violation of the law. It was held in Buckwalter v. U. S., (11 S. & R. 193), that the United States could sue in a state court to recover the penalty. In the case of U. S. v. Lathrop, 17 Johns. 4, which arose under the act of August 2, 1813, ch. 38, it was held that the state courts had no jurisdiction to entertain an action in the name of the United States to recover the penalty allowed by that act. By the act of July 20, 1790, ch. 29 (1 Stat. 131), the owner of a vessel was allowed to recover the damages caused by the desertion of a seaman. In Ely v. Peck, 7 Conn. 239, it was held that an action for such damages could not be prosecuted in a state court. The act of March 3, 1875, ch. 64 (4 Stat. 102), imposed a penalty for carrying letters on a post-road, or on a road parallel to it. In Davison v. Champlin, 7 Conn. 244, it was held that this penalty could not be recovered in a state court. In Jackson v. Rose, 2 Va. Cas. 34, which arose under the act of August 2, 1813, ch. 39, it was held that a state court could not entertain an action by a collector to recover the penalty. The act of March 23, 1830, ch. 40 (4 Stat. 383), provided that an assistant marshal might recover a penalty in an action of debt,—one-half to his own use, and the other half to the use of the United States. In Haney v. Sharp, 1 Dana, 442, it was held that the action could not be brought in a state court.

This review of the authorities shows that there has not only been a conflict among the authorities heretofore, but that the distinction between a remedial penalty and a criminal penalty will not reconcile them and has not been heretofore noticed. O. F. B.

JUDGE DILLON.

LETTER TO HON. THOS. C. REYNOLDS.

DAVENPORT, IOWA, July 1877.

Hon. THOS. C. REYNOLDS, St. Louis:

MY DEAR SIR:—I have just received yours of yesterday, in which you state that certain articles villifying me have been copied into the St. Louis papers. These attacks are based upon my official acts and decisions in the Iowa Central Railroad case. They are as unfounded and atrocious as any with which a judge was ever assailed. When viewed in the light of the record and history of the case, they are destitute of even plausibility. They proceed from the malice of a party connected with one of the warring factions among the bond-holders of this road. His animus and malignity are shown by the fact that he recently sent 200 copies of the paper containing the assault to this city. The assault is harmless where I am known or where the facts of the case are known; but elsewhere its tendency, as well as its design, is to injure me.

I wish to say that the all important rulings of the court in this case are in writing, and reported: 3 Dillon C. C. Rep. 487; 93 U. S. (3 Otto) 412; Western Jurist, July No. 1877, p. 428; 5 Cent. L. J. 56.

In every decision made, and every important act done, the able and learned district judge of this district, Judge Love, has been upon the bench, and he and I have concurred, and we concurred in the decision complained of in these articles.

I stand by every act I have done or concurred in. I stand by all of them from first to last. I stand by them not only as pure in purpose, but as legally right. I stand by them not only as legally right, but as just, fair and reasonable. I go further and claim that, so far from abusing any discretion, the court has made not even a mistake in the exercise of its discretionary powers.

When the court meets, and parties and counsel are present, I will take up the records of this case, and a simple statement of the facts will be all the vindication necessary. Meanwhile, so far as I am concerned, I put against these assaults the record of my judicial life, now covering a period of nearly twenty years.

It is said that I have delayed the foreclosure proceedings. There is not the least foundation for the charge. The decree was obtained by the Farmers' Loan and Trust Company, the appointed trustee for all the bond-holders, at the October term, 1875. 3 Otto 412. The court supposed at the time it was a decree by consent, but it soon afterwards turned out to be a mistake, and Sage, Cowdrey and others objected to it. The trustee asked to appeal for them, which was refused, for the reason stated in 3 Otto, p. 415, they not being parties to the suit, and the trustee not asking to appeal from the whole decree. These dissentient bond-holders, at the adjourned term in January, 1876, appeared and asked to set aside the decree, which the court refused, and they then asked to be allowed to take an appeal to *protect their own interests*, and their counsel offered to give a security-bond of $1,000,000. Up to this point my assailant is content with the decree and the action of the court. He objects that an appeal was allowed. What an arbitrary act it would have been to have denied the right of an appeal, to the extent to which it was allowed, every one must see. The supreme court in this very case refused to dismiss the appeal, and thus the act of the circuit court in this respect, and now made ground of complaint against me, has been sanctioned by the Supreme Court of the United States. The newspaper article says: "It is alleged against him (Judge Dillon) that, having first denied an appeal, he almost immediately afterwards allowed it, without any change of circumstances." How inaccurate this is appears by the report in 3 Otto, p. 415.

The first appeal was applied for by the trustee on behalf of certain bond-holders, *not parties to the record*, leaving the rest of the decree unappealed from. This I decided could not be done. The next application was made, not by the trustee, but by bond-holders who did not consent to the decree, to appeal so far as to protect their own interests, and the allowance of this appeal the Supreme Court of the United States has sustained. 3 Otto, 412. What can be thought of the accuracy of the statement that there was no "change of circumstances?" How unjust to charge me with improper conduct in allowing an appeal which the supreme court has sustained by refusing to dismiss it.

The article in question proceeds to state that Judge Dillon, "having in the first instance decided that it was impossible to have the decree corrected or a new decree entered, decided subsequently exactly opposite." This is a total misapprehension, and exactly the reverse is true, as will be seen in 3 Otto, p. 415, where I say, as "the term is not yet ended at which the decree was rendered, but stands adjourned until January next, the proper course for the parties in whose behalf an appeal is sought (viz., the appeal sought by the trustees and refused) is for them to appear, and if the decree is erroneously entered, or is improper, to apply to be made parties, or to have the decree corrected, or a new decree entered." It is thus seen by the official report that precisely the reverse of the newspaper statement is the truth.

The newspaper article proceeds to state that Judge Dillon, "having subsequently granted a stay of proceedings, and the case having been taken to the supreme court at Washington, and there decided against him, and the stay set aside, he still continued for some time to prevent the execution of the decree in almost

direct defiance of the opinion of the supreme court." I affirm positively that every statement in this paragraph is a mistake. First, I did not grant the stay of proceedings, but it was granted by Mr. Justice Miller, of the Supreme Court of the United States, who reduced the bond from $1,000,000 to $20,000, and who approved a stay-bond of $20,000. This appears by the report of the case in 3 Otto, 412. I never granted any stay of proceedings whatever. In the fall or winter of 1876, the supreme court, upon application, vacated the stay granted by Justice Miller, but entertained and retained the appeal, which is still pending, as the case has not yet been reached.

The next statement is, that "after the decision against him" (which was never made) I "still continued for some time to prevent the execution of the decree in almost direct defiance of the opinion of the supreme court." There is no truth in this statement. Ever since the action of the supreme court in the fall or winter of 1876, vacating the stay granted by Justice Miller, the trustee (in whose name and favor the decree was rendreed) has been at liberty to order a sale by the special master at any time and all times. Neither the court nor myself ever made any order tying the hands or restraining the trustee from selling the road, under the decree, at any moment. It is, therefore, exactly the opposite of the truth to say that "I still continued for some time to prevent the execution of the decree." The trustee, as the representative of all the bondholders, in view of the fact that an appeal was pending in the supreme court which might result, and may yet result, in a reversal of the decree and lead to great and new complications, and that a large minority of the bondholders opposed any sale until the appeal was determined, declined, in the exercise of its discretion, to advertise the road for sale under the decree.

The bondholders who desired a sale, represented by Mr. Ashurst, an able and respectable attorney of Philadelphia, asked the court for a mandatory order on the trustee or master to sell the road; the trustee appeared and opposed the application on the ground of the pending appeal, and because a large portion of the bondholders objected to a sale until the appeal was decided. I sent all the papers and arguments to my associate, Judge Love, who was then at Iowa City, without giving him my opinion, and he reached the conclusion that we ought not to interfere with the discretion of the trustee, but leave the trustee at liberty to sell under the decree or not as the trustee might determine to be for the best interest to all the bondholders. I concurred in this opinion. Judge Love's opinion and mine are reported in the Western Jurist, for July, 1877, page 428; (see 5 Cent. L. J. 56). Our reasons can be seen, and it is not a matter of debate that they are sound, for the same decision was afterwards made by the Supreme Court of the United States in this very matter. Judge Love's decision and mine were made in March, 1877. Up to this time there was no delay. We decided the application promptly. In concluding my brief opinion [West. Jurist, July, 1877, p. 429] I said: "We decide the matter now, so as to enable the parties who desire a sale to apply to the supreme court at this term for a mandamus to compel the execution of the decree, if they shall so desire." It is evident, therefore, that the circuit court desired no delay. The parties wishing a sale did accordingly apply to the supreme court at Washington for an order to compel the circuit court to execute the decree, and that court affirmed Judge Love's views and mine and refused the order asked for, on the ground that *that* matter, under the circumstances, belonged to the trustee to decide. At the May term, 1877, the application was renewed in the circuit court, and we decided the same way, and decided promptly. The report of that decision (West. Jurist, July, 1877, p. 433), shows that, in making this decision, I observed: "So far as this case is concerned, we (Judge Love and myself) think that what the supreme court has decided is conclusive against the legal right of these parties now applying to have this decree executed, but at the same time we wish to say, for the guidance of the trustee, that there is no restraint in the decree, or in what has been decided in either court against its execution, and that the appeal does not supersede it, and that the trustee is at perfect liberty, whenever he sees fit, to execute the decree." And I added, "As far as the court is concerned, considering the trouble this road gives us by reason of controversies and factions among the bondholders, we would be glad if the trustee could see its way clear to execute that decree, and would be glad if it could get the road out of court and into the hands of parties who could control it to their satisfaction. * * There is simply this question for the trustee to determine, namely, whether the best interests of all the *cestuis que trust*, or bondholders, would be best promoted by now executing the decree or by allowing it to stand until the determination of the appeal." It is therefore evident that the personal preference of the judge was to have the decree executed, and not to delay its execution.

It is a noticeable and most significant fact that the faction among the bondholders who wanted the sale made pending the appeal refused to submit that appeal to the supreme court under rule XX, when it could have been decided in a few days, but insisted on an oral argument which had the effect to tie up the appeal for two or three years until it is reached in regular order, and it is in consequence of their action that the appeal is yet pending in the supreme court.

After the adjournment of the May term, 1877, of the circuit court, the trustee directed the master to advertise the road for sale for July 18.

These facts, all of record, demonstrate that the charge that the circuit court, or that I as one of the judges of that court, has either refused to execute the decree or delayed its execution, to be utterly without foundation, and that what the circuit court decided on this point was correct, having been approved and sanctioned by the supreme court at Washington.

It is complained in the newspaper article that Judge Dillon "removed a perfectly competent receiver who was managing the road in a manner perfectly satisfactory to the bondholders, and with having put in a man unacquainted with railroad management (Mr. J. B. Grinnell, of Iowa), who at once began not merely to mismanage but to plunder the road; and further, on charges being brought against Mr. Grinnell, with having refused to examine them."

The court first appointed the superindent a provisional receiver. His management was not satisfactory. Charges and repeated charges of a serious nature were made against him, sustained by affidavits, and were renewed or pressed at every term. As he was originally made superintendent by one of the warring factions, Judge Love and myself finding that there could be no peace or satisfaction while he was retained, determined to change the receiver, and appointed the Hon. J. B. Grinnell, an eminent citizen of this state, living at one of the principal places on the road. This appointment was made at our own instance, without previous notice to Mr. Grinnell, for reasons that were stated at the time and are of record in the cause. Mr. Grinnell was widely known to the whole state and elsewhere as a man of unquestioned honesty, and we selected him so that distant bond-holders might, by reason of his high character, have an assurance that their interests would

be safe in his hands. His reports show that, instead of plundering the road, he has prevented others from doing this, and that he has managed it well. But no sooner was he in than the parties now assailing me commenced a warfare upon him. It is not true, as stated, that I declined to investigate charges made against him. The trustee made to the court no charges and no complaint. At one term some charges were made by the parties now complaining, involving his integrity, but not supported by any affidavit, and we said it is unjust to a man of Mr. Grinnell's character to arraign him before the country on hearsay charges; if these charges are verified by affidavit we will order them examined at once, and promptly remove Mr. Grinnell if they are sustained. I never heard anything more of them and supposed they were dropped.

It is also made ground of complaint that, early in the history of the suit, I appointed my father-in-law, Hon. Hiram Price, a commissioner to examine and report upon the road. The facts are these: All the various factions of the bond-holders were at Davenport at the hearing of some application, and charges were made of mismanagement by the superintendent (the same who was afterwards appointed receiver), and an investigation was desired of the condition and management of the road. After being unable to agree upon any one else all parties agreed upon Mr. Price, and at their request and without his knowledge or solicitation, I appointed him for this special and temporary purpose. Mr. Price had for many years been secretary of a railroad company; had been president of another company; had built and operated railroads, and his ability and well known integrity need no vindication at my hands. He came from a distant part of the country to discharge this duty; he made a thorough examination of the road and its management, made a full report showing how it was practicable both to increase the earnings and diminish the expenses. This is published and is of record. Here his duty ended, and the parties, without any action of mine, agreed that his compensation should be the sum of three hundred dollars—and only that. But it is said that Mr. Price long afterwards, "at the end of the tedious litigation, the price of the securities being much impaired by it, suddenly comes forward to buy the road at 33 cents on the dollar." I have no knowledge whether this is so or not, and Mr. Price is not now in the city. I know as little of his private business as I do of yours. But according to my recollection—for I have not the papers before me—the decree of October, 1875, directs the trustee to bid in the property for the whole amount of the mortgage debt, and as this greatly exceeds the value of the property, it is inevitable that the trustee must become the purchaser. If Mr. Price made such an offer as alleged. what harm is there? The parties in interest or the trustee is not obliged to accept it. I have never heard that Mr. Price was a bond-holder or is now one. The point of the charge is, as I suppose, that I have protracted and delayed the sale so as to depreciate the property that Mr. Price, or Mr. Price and others, might buy it. I have shown that neither the court nor myself have ever delayed the sale of the property, and hence the insinuation that it was delayed for a purpose wholly falls.

But I will not trouble you further with this matter, although it is one which, as I conceive, concerns the bar of my circuit in an especial manner. Against charges of this kind a judge is almost powerless. He can not reasonably be required to answer in the newspapers the aspersions cast upon him by disappointed or malicious litigants. No presumption ought to be indulged in favor of charges of injustice, for the obvious reasons that for judicial wrongs or mistakes the party or person aggrieved has a remedy in a higher court. I recognize my responsibility to the bar and to the public for my official acts. I fear no fair criticism. I invite the closest scrutiny. If a judge is guilty of acts unworthy of the high station, the bar should be fearless in condemning him; if he is unjustly attacked they should be firm in supporting him. As an influential member of the bar of the most important city in my circuit, I have deemed it proper to write you these explanations, that you may see that I have done nothing which would diminish your regard or lessen your confidence. Nearly twenty years ago I left a lucrative practice for the meagre compensation of a judge. My sole ambition was to achieve, if it might be, some honorable distinction on the bench. For this I have lived a life of honorable poverty (for my fortune is less than when I entered my judicial career), and I have done an amount of work which it astonishes me to look back upon. That man little knows me, my character or my aims, who supposes that I would conscientiously do any act that would dishonor the sacred character of a judge, or that I could be guilty of the matters charged against me. At my age I could not afford to sacrifice all I have gained as the reward of so many years' laborious toil—my character and my reputation. Neither of them will suffer from anything I have done in this case. None of the counsel in the case has instigated or sanctioned this shameful attack. On the contrary, I am advised that they repudiate it as unjustifiable and unreasonable. In this whole matter, from the beginning to the end, I have done my duty, and nothing but my duty. I shrink from nothing. I court investigation. I defy malice to point to any fact of which either I or my friends have any reason to be ashamed.

Very respectfully and truly yours,

JOHN F. DILLON.

JURISDICTION IN RESPECT TO CONTRACTS RELATING TO PATENTS AND COPYRIGHTS.

The following notes from the advance sheets of Mr. Bump's new book on Patent, Copyright, and Trademark Laws, will show the precise condition of the authorities upon a question which has been already discussed in these columns. See 4 Cent. L. J. 555.

UNITED STATES CIRCUIT COURT.—An action which raises a question of infringement is an action arising "under the law," and one who has a right to sue for the infringment may sue in the circuit court. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If the patent is involved, it carries with it the whole case. Littlefield v. Perry, 21 Wall 205; s. c., 7 O. G. 964; Magic Ruffle Co. v. Elm City Co., 13 Blatch. 151; s. c., 8 O. G. 773.

Whenever a contract is made in relation to patent rights which is not provided for and regulated by an act of Congress, the court will not, under this section, have any jurisdiction over a dispute arising out of it. Goodyear v. Day, 1 Blatch. 565; Blanchard v. Sprague, 1 Cliff. 288; Wilson v. Sandford, 10 How. 99; Goodyear v. Union Rubber Co. 4 Blatch. 63; Magic Ruffle Co. v. Elm City Co., 13 Blatch. 151; s. c., 8 O. G. 773.

The jurisdiction of the circuit court under this section does not extend to a controversy which arises under a contract concerning a patent to be subsequently obtained, rather than under the patent law itself. Nesmith v. Calvert, 1 W. & M. 34; Brooks v. Stolley, 3 McLean, 523.

If an infringement is proved, jurisdiction is conferred, and having power to protect the rights of a party under a patent, the court will take cognizance of other matters as incidental to the infringement. Hence the court

has jurisdiction if the defendant has forfeited his right under a license. Bloomer v. Gilpin, 4 Fish. 50; Brooks v. Stolley, 3 McLean, 523.

If a patentee sells the thing patented, to a purchaser, in violation of the license, the licensee can not maintain a bill in equity against the patentee and purchaser in the circuit court, without regard to the citizenship of the parties; for his rights arise under contract. Hill v. Whitcomb, 1 Holmes. 317; s. c., 5 O. G. 430.

If the parties are citizens of the same state, the circuit court has no jurisdiction over a bill to obtain the cancellation of a license on account of the invalidity of the patent. Merserole v. Union Collar Co. 3 Fish. 483; S. C. 6 Blatch. 356.

If the parties are citizens of the same State, the circuit court can not entertain a bill to compel the specific performance of a contract to assign a patent. Burr v. Gregory, 2 Paine, 426.

The mere fact that a bill prays for an account of the profits in asking for a specific performance, will not give the court jurisdiction. Burr v. Gregory, 2 Paine. 426.

The circuit court may have jurisdiction over a controversy on account of the residence of the defendant, even if it has not on account of the subject. Nesmith v. Calvert, 1 W. & M. 34.

If the parties are citizens of different States, and the amount claimed and in controversy exceeds five hundred dollars, the court has jurisdiction over a claim arising from a contract. Bloomer v. Gilpin, 4 Fish. 50.

II. STATE COURT.—The exclusive right of the inventor to make and vend his newly-discovered implement is wholly statutory. Where a statute confers a right and prescribes adequate means for protecting it, the proprietor is confined to the statutory remedy. A State court can not, therefore, entertain a bill in equity to enjoin an infringement. Dudley v. Mayhew, 3 N. Y. 9; Parkhurst v. Kinsman, 6 N. J. Eq. 600; Kempton v. Bray, 99 Mass. 350; Tomlinson v. Battel, 4 Abb. Pr. 266.

If two patents have been issued to different parties, the state courts have no jurisdiction to settle their conflicting claims, or to enjoin the subsequent patentee at the instance of the prior patentee. Gibson v. Woodworth, 8 Paige, 132.

A state court has no jurisdiction of an action brought by a patentee to restrain another from issuing circulars warning parties against purchasing a certain article, if the latter claims the right to do so under a patent. Hovey v. Rubber Tip Pencil Co., 33 N. Y. Sup. 522; s. c., 57 N. Y. 119.

The jurisdiction vested in the circuit courts is exclusive, and a state court has no jurisdiction over an action for an infringement of a patent. Parsons v. Ballard, 7 Johns. 144.

If a contract for a sale of a patent right is rescinded, and a note given for the return of the money paid thereon, the defendant, in an action on the note, can not plead the damages sustained by the plaintiff's infringement after the rescission as a set-off to the note. Smith v. McClelland, 11 Bush, 523.

A state court has no jurisdiction over an action of assumpsit to recover upon a *quantum valebat* for the use of a patented invention. Batten v. Kear, 2 Phila. 301.

A state court has no jurisdiction of an action by an assignee to enjoin an infringer or recover damages. Stone v. Edwards, 35 Tex. 556.

A state court can not entertain a bill for discovery and an injunction against an execution issued upon a judgment for damages rendered in an action for the infringement of a patent. Kendall v. Winsor, 6 R. I. 453.

If a state court has jurisdiction over the rights of parties arising out of a contract relating to a patent, it may incidentally inquire into the validity of the patent. Burrall v. Jewett, 2 Paige, 134; Sherman v. Champlain Co., 31 Vt. 162; Lindsay v. Roraback, 4 Jones Eq. 124; Slemmer's Appeal, 58 Penn. 155; Parkhurst v. Kinsman, 6 N. J. Eq. 600; Rich v. Atwater, 16 Conn. 409; Middlebrook v. Broadbent, 47 N. Y. 443; Rice v. Garnhart, 34 Wis. 453; Saxton v. Dodge, 57 Barb. 84. *Contra*, Elmer v. Pennel, 40 Me. 430.

In an action in a state court to recover the price agreed to be paid for a patent right, the defendant, for the purpose of showing a want or failure of consideration, may prove that the patent is void for want of novelty or utility. Rice v. Garnhart, 34 Wis. 453; Street v. Silver, Brightly, 96.

A state court has jurisdiction over an action to recover damages for fraud in the sale of a patent right. Hunt v. Hoover, 24 Iowa, 231; Warren v. Cole, 15 Mich. 265.

If a party who has discovered a process, without taking out a patent therefor, imparts the secret to another, under an agreement not to divulge it, he may maintain an action in a state court for an injunction and for damages for breach of the contract by the latter. Hammer v. Barnes, 26 How. Pr. 174.

If an inventor employs a mechanic to perfect his invention, under an agreement that the latter shall take out patents for the improvements, and assign them to the former, he may maintain an action in a state court to obtain an assignment, and recover the profits received in violation of the agreement. Binney v. Annan, 107 Mass. 94.

A state court has jurisdiction of an action to rescind a contract for a sale of an interest in a patent on the ground of fraud. Page v. Dickerson, 28 Wis. 694.

A state court has jurisdiction of an action by a manufacturer against a patentee for falsely and intentionally advertising that his manufactures were an infringement of the patent. Snow v. Judson, 38 Barb. 210.

If a patentee, in an assignment, warrants the novelty of the invention, a state court has jurisdiction of an action for the breach of the warranty. Wright v. Wilson, 11 Rich. 144.

A state court has jurisdiction over a suit to rescind a contract for the sale of a patent right on account of a fraud on the part of the patentee in the sale thereof. Lindsay v. Roraback, 4 Jones Eq. 124.

A state court has jurisdiction of an action by a patentee to recover damages for breach of an agreement not to use the thing patented. Billings v. Ames, 32 Mo. 265.

A state court has jurisdiction of an action by an inventor to recover the consideration stipulated to be paid to him by another for the privilege of taking out a patent therefor in his own name. Lockwood v. Lockwood, 33 Iowa, 509.

If a party agrees to improve machinery for a certain purpose, and the other party agrees to pay a certain price therefor, the defendant, in an action on the contract for the stipulated price, may show that the alleged improvement for which the patent was granted is worthless. McDougall v. Fogg, 2 Bosw. 387.

III. COPYRIGHTS.—If the controversy in regard to a copyright arises out of a contract, and not under the statute, the circuit court has no jurisdiction over it. Pulte v. Derby, 5 McLean, 328; Little v. Hall, 18 How. 165.

The circuit court has no jurisdiction of a bill in equity to protect the rights of an author at common law, where both parties are citizens of the same state. Boucicault v. Hart, 13 Blatch. 47.

The statute does not make the jurisdiction of the Federal courts over actions for the protection of the

rights of authors at common law in their manuscripts, or deprive state courts of jurisdiction over such actions. At most it gives parties within its provisions, and not claiming the benefits of a copyright under the laws of the United States, a cumulative remedy and a choice of tribunals. The jurisdiction of the state courts, in cases in which it had before been exercised, is not taken away or in any respect impaired. Palmer v. DeWitt, 47 N. Y. 532; s. c., 40 How. Pr. 293; s. c., 5 Abb. Pr. (N. S.) 13; s. c., 36 How. Pr. 22; s. c., Sweeny, 530: Woolsey v. Judd, 4 Duer, 379; Jones v. Thorne, 1 N. Y. Leg. Obs. 408.

BOOK NOTICES.

DIGEST OF THE AMERICAN LAW REGISTER. By BENJAMIN H. HAINES. Philadelphia: D. B. Canfield & Co. 1877.

For nearly twenty-five years the American Law Register of Philadelphia has held a foremost rank among the magazines devoted to law, and it still holds its position amidst the rivals which have arisen since it was founded. There are nine volumes of the old series and fourteen volumes of the new series, and these are in the hands of many hundreds of lawyers all through the country. These volumes constitute a valuable treasury of legal and judicial learning, and this digest is a key to all of it; for the digest comprises not only the judgments of the court, which are reported in full, but also the leading articles, the editorial annotations, etc., and a table of cases. It will be a very welcome volume to all who own the volumes of the American Law Register. It has been prepared with fidelity and care, and contains 1084 closely printed pages. J. F. D.

NOTES OF RECENT DECISIONS.

"CIVIL DAMAGE" LAWS—CONSTRUCTION OF OHIO STATUTE.—*Baker v. Beckwith*, 29 Ohio St. 315. Opinion by BOYNTON, J. A civil action under the seventh section, as amended April 18, 1870 (67 Ohio L. 101), of the act entitled "an act to provide against the evils resulting from the sale of intoxicating liquors in the state of Ohio," passed May 1, 1854, is authorized only where the sale or giving away is unlawful.

PROMISSORY NOTE—NEGLIGENCE—BONA FIDE HOLDER.—*Winchell v. Crider*, 29 Ohio St. 480. Opinion by MCILVAINE, J. A person possessed of the ordinary faculties and ability to read, signed a negotiable promissory note without knowing it to be such, but without reading the same, having an opportunity to do so, relying solely on the representation of the payee that the paper was an instrument other than a note. *Held*, as against a *bona fide* holder before maturity for value, such maker will not be permitted to deny the due execution of the note.

SUIT TO SET ASIDE FRAUDULENT SALE—AVERMENT OF KNOWLEDGE NECESSARY.—*Crump v. Chapman*. United States District Court, Eastern District of Virginia. Opinion by HUGHES, J. 15 N. B. R. 571. In a suit in equity, brought by the assignee to set aside a sale as fraudulent under sections 5128 and 5129, the bill must allege that the defendant *knew* that such sale was made in fraud of the provisions of the act, and such knowledge must be proved in the evidence taken in support of the bill.

BANKRUPTCY—PROMISSORY NOTE—PRESUMPTION—PLEADING.—*Hayes v. Ford*. Supreme Court of Indiana. Opinion by PERKINS, J. 15 N. B. R. 569. 1. Where the discharge of a bankrupt is brought into question in a collateral action, and the record discloses nothing on the point, the jurisdiction of the court granting such discharge will be presumed. 2. *Prima facie*, a judgment upon a promissory note is not for a fiduciary debt. 3. In an action to enjoin the collection of a judgment on the ground that the debtor has been discharged in bankruptcy, a copy of the discharge need not be set forth in the complaint, but the discharge may be pleaded by a simple averment of the facts.

SPECIAL ASSESSMENT—SEPARATE LIABILITY OF LOTS.—*Corry v. Folz*. 29 Ohio St. 320. Opinion by GILMORE, J. 1. Where a street has been improved and a special assessment by the front foot of the lot or parcels of land abutting on it has been made to pay the expense of the improvement, each lot or parcel of land so abutting is separately liable for the amount assessed upon it, provided the amount does not exceed the maximum allowed by law. 2. In an action brought to recover the amount of such assessments against the owner of two or more lots or parcels of land abutting on the street, it is error to charge either lot or parcel with the aggregate of the assessments.

AGREEMENT BETWEEN OWNER OF WATER-COURSE AND RAILWAY COMPANY—STATUTE OF FRAUDS—LICENSE—ULTRA VIRES.—*Hamilton, etc., Hydraulic Co. v. Cincinnati, etc., R. R.* 29 Ohio St. 341. Opinion by MCILVAINE, J. 1. An agreement between the owner of an artificial watercourse and a railroad company, whereby the former consents that the latter, in the construction of its road, may fill the channel and divert the water into a new channel on its own land, in consideration that the railroad company will open the old channel and restore the water thereto whenever requested, is not a contract for an interest in land within the meaning of the statute of frauds. 2. Where a license to fill up such watercourse is obtained from a corporation in possession as owner, in consideration of a promise to reopen and restore the watercourse when requested so to do, the licensee, when sued for a breach of his promise, is estopped from setting up that the ownership and maintenance of the watercourse by the corporation are *ultra vires*.

VERDICT VOID FOR UNCERTAINTY—PLEADING—SURPLUSAGE.—*Keyser v. Cannon*. 29 Ohio St. 359. Opinion by WELCH, C. J. 1. In an action to recover possession of "a strip of land *seven* feet wide on the east and west ends, by fifteen rods long on the north and south sides," in the southeast corner of a specified lot, the jury returned a verdict for the plaintiff "for the strip of land to be *two* feet in width, instead of seven feet in width as claimed in the petition, extending fifteen rods in length." *Held*, that the verdict was void for uncertainty, and that it was error in the court to refuse to set it aside. 2. Where the defendant, in an action for the recovery of the possession of land, denied the plaintiff's title and right of possession, and then, as a second defense, set up the statute of limitation, alleging that he and his grantors had been in adverse and exclusive possession for twenty-one years, *held*, that the second defense may be regarded as surplusage, being merely another form of denying the plaintiff's title, and a failure to reply to such does not entitle the defendant to judgment.

LORD COLERIDGE delivered a little temperance lecture the other day in charging the Hampshire assizes. He said that the calender was unusually heavy, nearly all the cases being the consequence of disturbances begun in public-houses or actually occurring there. His short experience on the bench convinced him of the truth of what had been said by other judges, that if England were made sober nearly all the gaols might be closed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

April Term, 1877.

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY, } Associate Justices.

GROSS NEGLIGENCE.—A person who voluntarily passed in front of a locomotive, while in motion, and was killed by the engine, when it was impossible to stop the engine in time to prevent the injury, is guilty of gross negligence, and even if the bell was not rung, nor the whistle sounded, no right of action exists. Opinion by NORTON, J.—*Harlan v. S. L., K. C. & N. R. R.*

POLICY OF INSURANCE.—When a policy of insurance stipulates that, on failure to pay any installment when due, the policy should be *suspended* during the continuance of such failure (but not absolutely void); and, also, that such failure should have the effect to make the whole note due, upon failure to pay such installment the company may recover the whole amount due upon the note. Williams v. the Albany City Ins. Co., 19 Mich. 451. Opinion by HOUGH, J.—*American Ins. Co. v. Klink.*

MALICIOUS PROSECUTION—INSTRUCTIONS.—In an action for malicious prosecution it is error to instruct that, where the defendant pleaded that the prosecution was instituted on the advice of competent counsel, the defendant "must show that the attorney advised him to institute the prosecution." Sharp v. Johnston, 59 Mo. 558. It is also error to instruct that defendant is liable "unless, in instituting the prosecution, he was acting from a desire to protect his family and without malice." If there was probable cause, the fact of malice does not make him liable. Opinion by NORTON, J.—*Burns v. North.*

PRINCIPAL AND SURETY—SUFFICIENCY OF ANSWER.—An answer to an action on a note given for money borrowed from the school funds, which alleges that at the time the surety signed the note the county took a mortgage from the principal debtor to secure the same, and that the county court subsequently released 120 acres of the land from the mortgage, does not state a good defense to the action. It fails to aver that the surety was injured thereby, and, when the creditor releases securities given by his debtor, the surety is only discharged to the extent that he is actually injured by such release. (*Quære:* Could the county court release the land?) Opinion by HOUGH, J.—*Saline County v. Buic.*

SCHOOL LAW—CONSTITUTIONAL LIMITATIONS.—The act of 1867, sect. 1, pp. 165-6, provides for the country, taking in the town or village for school purposes, and is to be enforced by the *board of education of the township*. The act of 1868, sect. 1, p. 164, provides that a town organized into a special school district may attach additional territory to its limits by resolution of the board of education *of the town or city*. 53 Mo. 127. Both of those statutes have been changed by the statute of 1870. 2 Wag., p. 1267, sec. 17. Sec. 8, art. 9 of the constitution of 1865, is not to be regarded as a limitation or curtailment of the power given by section 1 of the same article, and the power to provide for a school "at least four months," is not a negation of power to provide for a longer period. Opinion by NORTON, J.—*State ex rel. Sharp v. Miller et al.*

VENDOR AND VENDEE—COVENANTS ABSOLUTE OR DEPENDENT.—The undertakings of vendor and vendee are dependent, and to entitle vendor to recover purchase-money, he must aver and prove performance on his own part, or an offer to perform. But if a contrary intention appear plainly, it will prevail in determining the dependence or independence of the covenants. 8 Mo. 488; 10 Johns. 242; 10 S. & M. (Miss.) 560; 42 Mo. 101; 47 Mo. 85; 5 Pick. 395; 13 Pick. 281. A promise made to one, for a valuable consideration, moving from him to another who agrees to pay a sum of money to a third person, will support an action by the latter. 58 Mo. 589; 44 Mo. 328; 57 Mo. 466; 20 N. Y. 268. Where defendant bought real estate incumbered by deed of trust for a sum supposed to be the value of his interest therein above the incumbrance, giving his notes for the purchase-money, under a written contract that he would satisfy the incumbrance, and the holder of the note assigned the same to plaintiff, and the defendant allowed the real estate to be sold to satisfy the deed of trust, he can not defend against the plaintiffs action on the ground that the title has failed, or that the note was without consideration. Opinion by HENRY, J.—*Cress v. Blodgett.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.
" HORACE P. BIDDLE,
" WILLIAM E. NIBLACK,
" JAMES L. WORDEN,
" GEORGE V. HOWK, } Associate Justices.

BANK CHECKS—NOTICE OF NON-PAYMENT—DILIGENCE.—In an action by the payee against the drawer of a bank check, the complaint must aver that the drawer had notice of the non-payment of the check. The protest is not the basis of the suit. 46 Ind. 172. The same rule applies substantially to checks as to bills of exchange and promissory notes as to the diligence used in presenting them for payment. They must be presented within a reasonable time in order to charge the drawer or indorser. Judgment reversed. Opinion by NIBLACK, J.—*Pollard, Adm'r., etc., v. Bowen.*

LANDLORD AND TENANT—ACTIONS IN TORT AND ON CONTRACTS.—Where a tenant has leased land, agreeing to pay his landlord, as rent, one-half the corn raised, in rows standing in the field, the tenant has the right to the possession of all the corn until the division is made, and can maintain an action of trespass against the landlord for injury to the crop. In such an action the landlord will not be permitted to show, in mitigation of damages, that the tenant, in dividing the corn, took more than his share. Whether such a taking is to be considered as arising *ex contratu* or *ex delicto*, it would not be a good answer to the action; for matter of contract will not answer matter of tort, nor will one tort answer another. Judgment affirmed. Opinion by BIDDLE, J.—*Trout v. Hardin.*

VOLUNTARY ASSIGNMENTS—WHEN TITLE PASSES TO ASSIGNEE.—The statute providing for voluntary assignments of real and personal property declares that such assignments "shall, within ten days after the execution thereof, be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same," etc., and that no such assignment "shall convey to the assignee any interest in the property so assigned, until such assignment is recorded," etc. It is within the power of the legislature to fix the time when, and conditions upon which property assigned under this act should vest in the assignee, and under this act the title does not pass to the assignee until the recording of the assignment, but the filing of the assignment in the recorder's office will be regarded as a recording of the same. Judgment affirmed. Opinion by PERKINS, C. J.—*Forkner v. Shafer et al.*

TAXES ON DECEDENT'S ESTATE—DUTIES OF ADMINISTRATOR CONCERNING.—Where taxes have accrued upon the land of a person before his death, they become a personal charge against him, as well as a lien upon the property, and should be paid by the administrator, because they are debts against the estate; but it is not the duty of an administrator to pay taxes on land which accrued after the death of the intestate. The lands descend directly to the heir, who should pay the taxes accruing after descent is cast. And where an administrator brought suit on a note given in payment for real estate sold by such administrator, the land being, at the time of such sale, encumbered with taxes which the defendant was compelled to pay, and which had accrued after the death of the intestate, the amount so paid could not be set off against the note given for purchase-money. Judgment affirmed. Opinion by WORDEN, J.—*Henderson v. Whitinger, Adm'r.*

LAW OF DESCENT—POWER OF ELECTION BY GUARDIAN OF INSANE PERSON.—1. The 17th section of the act regulating descents (1 R. S. 1876, 411) provides that if a husband die testate or intestate, leaving a widow, one third of his real estate shall descend to her in fee, etc. Upon her death, she not having married again, such real estate descends to her heirs generally, and not exclusively to the

children of the marriage, by virtue of which the estate came to her; but the children of her deceased husband by a former marriage are not her heirs at all, and can take no part of such estate. 2. There is nothing in the statute which in terms confers upon the guardian of an insane woman the power to select for her between the provisions of a will and the provisions of law in her behalf. Such right of election is a personal one and not transmissible by descent. Where the guardian of such insane woman makes such selection for her it is a nullity, and the title to the land continues to be vested in her till her death and then descends to her heirs. Judgment affirmed. Opinion by WORDEN, J.—*Heavenridge v. Nelson.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

APPEAL.—After judgment an appeal will not lie from an order refusing a new trial, or from any other interlocutory order which is reviewable on appeal from the judgment itself. Opinion by COLE, J.—*Victor Sewing Machine Co. v. Heller.*

PLEADING—DEMURRER.—Under our statutes a demurrer will not lie to a complaint upon the mere ground that it demands greater, or other relief than that to which the facts alleged show plaintiff entitled. Thus, where its states a cause of action against the defendants personally it is not demurrable for improperly demanding also a judgment to enforce an alleged lien for the amount claimed. Opinion by LYON, J.—*Yewksbury v. Schulenburg et al.*

CAVEAT EMPTOR—ABANDONMENT OF POSSESSION—EVIDENCE.—1. One who takes a promissory note, which shows that the interest on the principal sum therein named is past due and unpaid, takes it subject to all equities between the original parties. 2. If the vendee of land under an executory contract abandons the possession and the vendor resumes possession without any agreement between them for a rescission of the contract, it is not extinguished, and the vendee's notes for the purchase-money continue to be valid as between the original parties. 3. One sued as a party to a contract may testify in his own behalf that he was a minor at the time of its execution. Opinion by COLE, J.—*Hart v. Stickney et al.*

AGENCY—PRACTICE.—1. Where A orders in his own name, but for the use and *as the agent* of B (being duly authorized thereto), a chattel from a distant market, and the same is so sent as to make A liable therefor to the vendor, he may pay for it, and, upon delivering it to B, may recover from him the amount so properly paid, although the chattel on its arrival was not in good condition, and the payment by A was made *after* he had notice of that fact from B, who refused to receive it. 2. An error in the instructions, which was not prejudicial to the appellant, is no ground of reversal. 3. A judgment will not be reversed on the ground that the verdict was contrary to the weight of evidence. Opinion by COLE, J.—*Grun v. Feil.*

EVIDENCE—MEASURE OF DAMAGES.—1. A witness who testifies that he made a correct written memorandum of certain facts at the time of their occurrence; that, the original being defaced, he had, before starting from home for the place of trial, made a correct copy thereof; and that such copy having also become defaced, he had caused another copy to be made thereof, which he knows to be correct, may use such second copy to refresh his memory at the trial. 2. In an action for injuries done to plaintiff's crops by the flowing of his land, the measure of his damages is the value, while standing upon the ground, of so much of the crop as was wholly destroyed, and the depreciation in value of the remainder resulting from the flowage. Opinion by COLE, J.—*Folsom v. Apple River Log-Driving Co.*

SPECIAL FINDING.—In an action for damages for the burning of a barn caused by sparks from defendant's locomotive, the jury were instructed, as a matter of law, that the locomotive was properly constructed and supplied with all known and usual means for preventing the escape of sparks, and that defendant was not liable unless the fire was caused by the negligent and unskillful management of the locomotive by defendant's agents; and they were required to find specially whether defendant was guilty of negligence, and if so, *in what such negligence consisted.* The jury, answering the first question affirmatively, found that the negligence consisted in "not using proper precaution in handling the engine to prevent the extraordinary escape of sparks in passing the farm." *Held*, that the finding is sufficiently specific. Opinion by COLE, J.—*Caswell et al. v. C., M. & St. P. R. R. Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

January Term, 1877.

(Filed June 22, 1877.)

HON. BENJAMIN R. SHELDON, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" JOHN SCHOLFIELD,
" PINCKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG, } Associate Justices.

EXECUTIONS—EXEMPTIONS.—The law does not presume that a person does not have property exempted from execution by the statute, nor does the mere *claim*, of property not enumerated, prove that it is exempt. The fact must be satisfactorily proved by evidence, as it is not matter of legal presumption one way or the other. So also when one claims exemption on the ground that he is the head of a family and lives with them, it must be clearly and satisfactorily shown before its benefits can be allowed to the claimant. Opinion by WALKER, J.—*McMasters v. Alsop.*

WARRANTY—TAX CERTIFICATE.—In the absence of an express warranty, the assignor of a tax certificate warrants only that what purports to be a tax certificate, is not a forgery. He does not warrant that the description of the land is good and sufficient, that the taxes for which the land was sold were duly levied and assessed, and remained due and uupaid, or that intervening taxes have been paid, and due notices served to perfect a tax title on failure of redemption. Opinion by DICKEY, J.—*Strong v. Loefler.*

MALICIOUS PROSECUTION—PROBABLE CAUSE.—In a suit for malicious prosecution the finding of the facts in reference to the probable cause is for the jury, but when once ascertained, it is a matter of law whether such facts constitute probable cause. Where a party is in possession of information he professes to have had, believes it to be true, and acts in good faith upon such belief, there is probable cause for prosecution. Judgment reversed. Opinion by SCOTT, J.—*Angelo v. Faul.*

CONTRIBUTORY NEGLIGENCE.—Where plaintiff, acting as brakeman on a railroad, was injured while uncoupling cars, one being a flat car having no railing, the other a combination car on which there was a railing, and plaintiff in uncoupling should have remained on the combination car, and run it out on the switch, in which case no accident would have happened, *held*, that the plaintiff was not entitled to recover. Judgment reversed. Opinion by SHELDON, C. J.—*C. & A. R. R. Co. v. Rush.*

SHERIFF—NEGLIGENCE IN TAKING BOND.—In a suit on an official bond of a sheriff for damages resulting from the taking of a worthless replevin bond, and from failure to take a bond in double the amount of the value of the property, as required by the statute, the sheriff will be held liable, if guilty of negligence either in the taking of sureties on the bond or in estimating the value of the property. He is bound to use care and diligence, and no amount of good faith on his part will exonerate him, if damage ensues from his neglect. Opinion by WALKER, J.—*People, etc., v. Cove.*

PROMISSORY NOTE—COTEMPORANEOUS PAROL AGREEMENT.—In a suit on a note "to become due and payable when the track of said railroad shall be laid from Cairo through Pulaski County, and cars shall have run thereon," a plea setting up a further understanding when note was made, that the road should be completed within two years, and it not being so completed, there was a failure of consideration, *held*, demurrable. It only sets up what is outside the the note, and would amount to an alteration of the

written instrument, which could not be done by plea or otherwise. Judgment reversed. Opinion by CRAIG, J.—*Cairo & Vincennes R. R. v. Parker.*

CONDEMNATION OF LAND FOR STREET.—In a proceeding by a city, under Art. IX of the general incorporation acts for cities and villages, to condemn a strip of land for the purposes of a street, a judgment that the owner of the property have and recover of the city its value, and the entering of an order vesting in the city the title on payment of judgment, is wrong. The proceeding is simply for the purpose of ascertaining and fixing judicially the amount which the city should pay as just compensation in order to be entitled to take that property for a street. This proceeding merely fixes the amount to be paid before the property can lawfully be taken. In such a proceeding the jury may consider and award damages to the owner for the property left, which was a part of that taken, under the same bill filed, no cross-bill being necessary. Judgment reversed. Opinion by DICKEY, J.—*City of Bloomington v. Miller.*

QUO WARRANTO — OPERATING CONTROL BETWEEN RAILROADS.—On an information filed, in the nature of a *quo warranto*, alleging that the Illinois Midland R. W. Co. is using, without any lawful grant, the powers conferred by the people upon the "Paris & Decatur R. R.," the party charged must by plea either justify or disclaim having done so. A plea must not contain a justification and a disclaimer. In such a case, proof that the Peoria, Atlanta and Decatur R. R. changed its corporate name to that of the "Illinois Midland R. W. Co.," and that the latter company made a contract with the Paris & Decatur R. R., whose franchise the former is alleged to have usurped, by which the Illinois Midland R. W. Co. was to *operate* the Paris & Decatur R. R., is a complete justification. Judgment reversed. Opinion by SCOTT, J.—*Ill. Midland R. W. Co. v. The People.*

INJUNCTION—NOTE MADE BY INSANE PERSON.—A obtained judgment against B on a note given in payment for a machine sold by A to B, and execution issued. B having died, his wife thereupon filed a bill for an injunction to stay proceedings on the writ of execution, alleging that, at the time of the purchase and giving of the note, her husband was an insane person. The proof showed that B had been at times insane, but was managing his own property, had a good farm, and at the time of the purchase of the machine there was nothing in his conduct or appearance to excite suspicion; that he seemed to understand fully what he was doing; that the agent set up the machine at B's farm, all his family being present, and no one raised an objection, although *the wife knew of the purchase*, and that they used the machine four years. *Held*, that although the defense of insanity would have been good in a suit on the note, equity will not interpose. Opinion by BREESE, J.—*McCormick et al. v. Littler.*

ADMINISTRATOR'S SALE—PROOF OF NOTICE—FINDING OF COURT BELOW—ADMINISTRATOR BUYING AT SALE.—1. Where it appears by the the notice and certificate of the printer that the publishing of the application for sale by an administrator, as required by the statute, was not according to law, but the record of the court making decree for sale recited that, "it appearing to satisfaction of the court that notice had been given of the pendency of the petition according to law, by publication," etc.; *Held*, that the finding of the court can not be overcome by the production alone of a defective notice on file with the papers, inasmuch as the court may have made up its conclusion from other evidence. 2. The buying in of the property by the administrator, or some one in his interest, at such sale, is not void, but voidable only, and can be set aside by those interested, if suit is brought within the proper time. Although there is no fixed time in a court of equity within which a claim will be barred on the ground of laches, yet courts of equity, by analogy, often adopt the limitation provided by law, and three years having intervened, in case at bar, plaintiff has no remedy. Judgment reversed. Opinion by CRAIG, J.—*Sloan v. Graham.*

CAN NOT some one send us a fresh decision upon the law of "strikes?"

THE bar of Atlanta, Ga., has presented a drinking fountain to that city, whereupon a daily newspaper remarks that Atlanta can boast of having the only fountain of law in the state.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

January Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

ACTION OF REPLEVIN.—Under our statutes an action of replevin can be maintained against an officer for the recovery of personal property which he holds by virtue of a previously existing order of delivery, provided the plaintiff in the last action was no party to the first action or order of delivery. The same rule obtains as to property held under an order of delivery as to that held under an execution, or any other mesne or final process, and the party against whom the writ runs is the only one who may not assert his rights to the property by an action of replevin. Judgment reversed. Opinion by BREWER, J.; all the Justices concurring.—*Gross v. Greenfield et al.*

PRACTICE IN EQUITY CASES — HOMESTEAD — WIFE'S PROPERTY NOT LIABLE FOR DEBTS OF HUSBAND — TEMPORARY ABSENCE IN THE INDIAN COUNTRY NO ABANDONMENT OF HOMESTEAD.—1. In an action in the nature of a suit in equity, the court may, in its discretion, send any or all of the issues in the case to a jury to be tried; and if it sends all such issues to a jury, it may do so by a general order, without even mentioning any particular issue; and the jury may then (unless the court should otherwise order, either on its own motion or at the request of one of the parties), find a general verdict upon all such issues. 2. Where a husband purchases land with his own money, but in his wife's name, for the purpose of placing the property beyond the reach of his own creditors, and then with his own money makes improvements on said land, and then enters upon said land and occupies the same with his family as his residence and homestead: *Held*, that such transactions are not fraudulent as to *subsequent* creditors of the husband, and that they (the creditors) can not look to the land as being subject to the payment of their claims. 3. And generally the expenditure of money in purchasing a homestead, or in subsequently paying therefor, or in making improvements thereon, can never be charged as a fraud upon the rights of creditors or others, unless the complaining party had, at the time of such expenditure, some special interest in, or claim upon the funds used for such purpose. 4. And it can make no difference in such a case whether the husband or wife owned the money, or in whose name (of the two) the title to the homestead was taken. In any such case the property would be exempt from forced sale. 5. Probably no spot can be found in Kansas where a homestead may not be taken and held under the homestead exemption laws, provided of course that the property may be owned and occupied as the residence of a private individual; even within the limits of an unincorporated town or village such a homestead may probably be so taken and held. But the question is hardly in this case. It was alleged in both the petition and the answer that the property claimed as a homestead was situated in the town of Muscotah. The answer alleged that said town was incorporated, and there was no pleading in the case, verified by affidavit, putting in issue this allegation. Therefore, *held*, that said allegation, under the statute (Gen. Stat. 650, sec. 108), be taken as true, and that said property was subject to be held under the homestead exemption laws; and further *held*, that the word "corporation," as used in said section 108, means municipal corporations, such as cities, towns and villages, as well as private corporations. But even if the question whether the town of Muscotah was incorporated or not was in issue, still the court below made a general finding in favor of the parties claiming the homestead and against the other parties. 6. Where the title to certain lands, which is the homestead of the husband and wife and their family, is in the wife and not in the husband, and they all abandon such land as their homestead, this abandonment of itself does not authorize the land to be taken for the husband's debts, and this would be true even if the land was originally purchased with the husband's money. 7. A debtor can not commit a fraud upon his creditor by disposing of his homestead. A debtor, in the disposition of his property, can commit a fraud upon his creditor only by disposing of such of his property as the creditor had a legal right to look to for his

pay. 8. A husband and wife, who temporarily leave their homestead in Kansas and sojourn in the Indian country, in the service of the United States, do not thereby lose their homestead rights, so long as they intend to return to their homestead and do not acquire another residence; and it makes no difference that they may rent their homestead to tenants in the meantime. Judgment affirmed. Opinion by VALENTINE, J.; BREWER, J. concurring; HORTON, C. J., not sitting, having been of counsel in the court below.—*Hixon v. George et al.*

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.
" JAMES D. COLT,
" SETH AMES,
" MARCUS MORTON,
" WILLIAM C. ENDICOTT, } Associate Justices.
" AUGUSTUS L. SOULE,
" OTIS P. LORD,

MECHANIC'S LIEN—EXTENT OF.—Petition to enforce a lien on the land described in the petition, for labor performed in building cellars on that land, in part, and partly on the land adjoining. The whole labor was done under an entire contract, so that, if the respondent was the owner of all the land on which the petitioner labored, a lien might have been enforced on the whole under a proper petition. Wall v. Robinson, 115 Mass. 429; Worthley v. Emerson, 116 Mass. 374. It does not appear affirmatively that the land not described in the petition, on which a part of the labor was done, was owned by the respondent. But, whether he was the owner or not, no lien can be maintained on the land described, for labor performed on land not included in the petition, though it be "contiguous" to the parcel described. Rathbun v. Hayford, 5 Allen, 406; Landus v. Dexter, 106 Mass. 531; Stevens v. Lincoln, 114 Mass. 476. Opinion by SOULE, J.—*Foster v. Cox.*

INDEMNITY BOND—DAMAGES.—In an action upon a bond conditioned that the principal obligor "shall well and truly pay, or cause to be paid, all demands, acceptances, or indorsements and obligations for which said V is in any wise responsible for or on account of said W. & Co., and shall hold and save said V harmless and free from loss or inconvenience on account of any debt, claim, demand or liability of the firm of said W. & Co.," it was *held*, without deciding whether the damages in suits on contracts in the nature of indemnity should, as intimated in Gilbert v. Wiman, 1 Coms. 550, be measured by the loss actually sustained, or whether, as in Furnass v. Durgin, 119 Mass. 500, 507, the whole amount of the penalty could be recovered after the debt has become due, without the plaintiff having first paid it himself, that upon the facts and special circumstances of this case the bond is to be construed as a contract of indemnity merely, and the damages limited to the actual loss. Little v. Little, 13 Pick. 346; Aberdeen v. Blackman, 6 Hill, 324; Webb v. Pond, 19 Wend. 423; Wallis v. Carpenter, 110 Mass. 347. Opinion by AMES, J.—*Valentine v. Wheeler.*

SALE—LEX LOCI SOLUTIONIS—PAYMENT BY NOTE—PROOF OF FOREIGN LAWS.—An offer for a cargo of coal to be delivered at the defendant's place of business in Portland, at a price named, was given by the defendants in Boston to a traveling agent of the plaintiff, and forwarded by the latter, by telegraph, to the plaintiff's place of business in New York. The offer was accepted, and on receipt of the coal at Portland the defendant sent the note of B to the plaintiff for the amount of the purchase, payable in four months to plaintiff's order, inclosed in a letter which stated that it was in settlement for the coal, and requested the return of the invoice receipted. The invoice was at once returned by the plaintiff, receipted as paid by the note in question. The latter thereupon indorsed the note, had it discounted, and, upon failure of the maker, took it up at maturity. Soon after the plaintiff notified defendant that he intended to hold him for the price of the coal, and offered to return the note. In an action to recover such price, it was *held*, 1. That until the coal was delivered at Portland the contract of sale was executory, and the property did not pass. 2. The law of the place where the contract is to be executed governs, as to its construction and force (Abbeiger v. Martin, 102 Mass. 70; Dolan v. Green, 110 Mass. 322; Suit v. Woodhall, 113 Mass. 391; Kline v. Baker, 99 Mass. 254; 2 Kent Com. 459), and, in the absence of any express agreement, must determine the place of payment. 3. As there was an express agreement that the note should be deemed payment, it is immaterial whether the sale and taking of the note were separate transactions or not, and whether the transaction, in whole or in part, is governed by the laws of New York. 4. In Massachusetts the giving of a negotiable note is evidence of payment of a pre-existing debt (Wiseman v. Lyman, 7 Mass. 286; French v. Price, 24 Pick. 13; Butts v. Dean, 2 Metc. 76), and, in the absence of evidence, the same rule will be held to prevail in Maine. 5. The laws of another state must be proved as facts are proved. Kline v. Baker, 99 Mass. 254. Opinion by COLT, J.—*Ely v. James.*

NOTES.

RECENT English cases apply the rule, which restrain dealings between client and attorney with unrelaxed stringency. In Morgan v. Minett, before Vice-Chancellor Bacon, in June last, it appeared that the defendant was the confidential solicitor of the plaintiff, who was a clergyman, and who had assisted him considerably in his early professional career. Morgan released Mr. Minett from an indebtedness, and in his will gave him legacies. It appears that Mr. Morgan while living had repeatedly said of Mr. Minett, "He is my right hand; I do not know what I should do without him." The releases were executed while Mr. Morgan was acting under the advice of Mr. Minett. The Vice-Chancellor held that the next of kin were entitled to have the releases set aside, and to enforce the payment of the solicitor's debt. The Vice-Chancellor laid down the rule as being that a solicitor can only take a gift from his client if made after the relation has ceased, or on showing that the client had clear independent advice.

THE plea in abatement to an indictment on the ground of misnomer, which a correspondent of the Albany Law Journal has unearthed from one of the early volumes of reports of this state, is worth reprinting. It was in the case of Michael Sunday v. State of Missouri, on appeal from the St. Louis Criminal Court. The defendant appeared in person and urged as follows:

"The appellant hails from Germany, where he came into the world, bearing the ancestral name of Sontag, which, translated from the Teutonic into Anglo-Saxon, means Sunday. By the latter name he has been impleaded in the criminal court, that tribunal claiming the right to rebaptize him in English. Of the legality of such proceedings he is dubious. A Dutch wood-chopper has a little pride in his patronymic, and insists that the power which would seek to divest him of it is of a piece with that which would despoil a Highlander of his breeches. At the unprecedented liberty taken with his name he was, as became him, indignant. He gave vent to his indignation in the form of a plea of misnomer, asseverating that he was not Sunday, but Sontag. That if Sunday had been guilty of any illegal action and doings, Sontag had neither act or part in them, nor was he willing in his stead to become a denizen of the penitentiary. His plea thus plain and impregnable was not even treated with the decent ceremony of a replication, but was summarily erased; against which he entered his solemn protestation, and now reiterates the same before this court, where he trusts the laws of human nomenclature are held in more reverence and his complaint will meet with better luck. The appellant is advised of a legal principle called *idem sonans*, which protects a man who has a name, and thinks it worth keeping. If this be so, Sunday no more sounds like Sontag than it sounds like Sabbath or Lord's day, or *Dies Dominicus*. All these may indeed be *idem significans*, but if they are *idem sonans*, his ears deceive him so badly that he gives up all pretensions to know the difference betwen sounds, and could not tell a cough from a sneeze. To all who set any value on a name, this new idea of *idem significans* is alarming. If by virtue of it Sontag may be made Sunday, there is no similar desecration for which it may not furnish a pretext. Not to go far for illustrations, Lackland might be held *rectus in curia*, as Baron vide Poche, and Colt as Nebuchadnezzar, or Grass Eater. The appellant submits that, having tendered an issue by his plea, he is entitled to have it tried in which he is ready to verify, that by one name he has had his being, moved and lived, and by it he hopes to die."